TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

N[redacted] 194

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

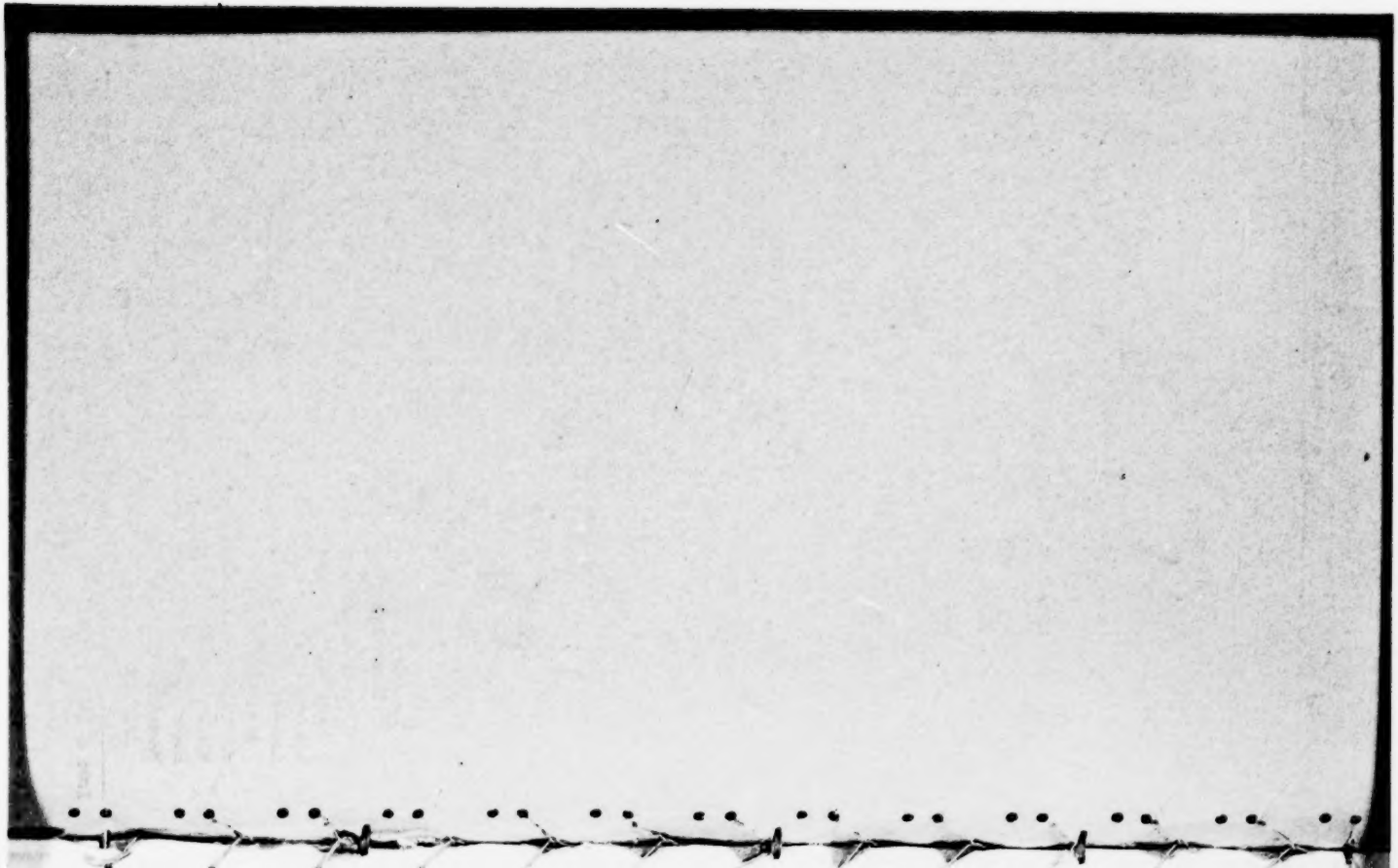
vs.

HARRY B. WOLF, CHARLES M. BLACKMAR, AND HENRY A. BUNDSCHIE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 14, 1921.

(28,538)



(28,538)

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OCTOBER TERM, 1921.

No. 583.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1920, of said Court, before the Honorable William C. Hook and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Robert E. Lewis, District Judge.

Attest:

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the sixteenth day of June, A. D. 1919, a transcript of record, pursuant to a writ of error directed to the District Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Kansas City Southern Railway Company was Plaintiff in Error, and Harry B. Wolf was Defendant in Error, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

b (*Citation.*)

UNITED STATES OF AMERICA, *ss.*:

To Harry B. Wolf, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western Division of the Western District of Missouri, wherein The Kansas City Southern Railway Company, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Arba S. Van Valkenburgh, judge of the District Court of the United States for the Western Division of the Western District of Missouri, this 10th day of January, in the year of our Lord one thousand nine hundred nineteen.

ARBA S. VAN VALKENBURGH,
Judge.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Missouri, set:

We hereby acknowledge due service of the within citation this 10th day of January, A. D. 1919.

CHARLES M. BLACKMAR,
HENRY A. BUNDSCHU,
Attorneys for Defendant in Error.

c (*Writ of Error.*)

UNITED STATES OF AMERICA, *set:*

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western Division of the Western District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, at the April Term, 1918, thereof, between Harry B. Wolf and The Kansas City Southern Railway Company, a manifest error hath happened, to the great damage of the said Kansas City Southern Railway Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 11th day of March, 1919, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, chief justice of the Supreme Court of the United States, and the seal of said District Court.

Issued at office in Kansas City, this 10th day of January, in the year of our Lord one thousand nine hundred nineteen.

EDWIN R. DURHAM,
Clerk.

By C. J. MURRAY,
D. C.

Allowed by
ARBA S. VAN VALKENBURGH,
District Judge.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, and with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Circuit Court of the United States for the Western Division of the Western District of Missouri.

Issued at Office in Kansas City, this 14th day of June, A. D. 1919.

[SEAL.] EDWIN R. DURHAM,
Clerk.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that heretofore, to-wit, at the regular April term of the United States District Court for the Western Division of the Western District of Missouri, and on the 12th day of May, 1915, the following entry appears of record, to-wit:

No. 4367.

HARRY B. WOLF

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY.

This day comes plaintiff and files petition herein.

(*Petition.*)

To the Honorable Arba S. Van Valkenburgh, judge of the District Court of the United States in and for the Western Division of the Western District of Missouri:

Your petitioner above named, respectfully shows, represents and alleges as follows, to-wit:

1.

That the defendant, "The Kansas City Southern Railway Company," is now and at all times hereinafter mentioned has been a corporation doing business as a common carrier of passengers and freight for hire, wholly by railroad between points in the State of Missouri and points in the State of Kansas, and owning, operating and controlling cars and rolling stock and locomotives propelled by steam upon its roadbed, and owning its franchises and right of ways and maintaining its offices and agents in said states, and as such common carrier is subject to the provisions of the act to regulate

commerce, approved February 4th, 1887, and acts amendable and supplementary thereto, provided for by the Congress of the United States.

2.

That at all times hereinafter mentioned A. Grossenbach Company was a corporation with its principle place of business at Milwaukee, Wisc., and owners of the following described property, to-wit:

540 Crates Strawberries of the weight of 16,200 pounds.

That on or about the 17th day of May, 1910, said owners caused to be delivered to defendant carrier and said railroad did accept and receive from said owner the hereinbefore described property for transportation and shipment from Neosho, Mo., to Milwaukee, Wisc., (shipped in car CFX 10192), for the services so by defendant carrier performed, said defendant did charge, exact and collect from said owner the sum of $167.45.

2 3.

That such charge was contrary to the existing, lawful and published tariff rate governing and applying upon said shipment at the legal rate of 94 cts. per 100 lbs., on actual weight, or the lawful sum due and owing defendant by said owner thereon, in the sum of $152.28, to said owner's damage in the sum of $15.17.

4.

That said claim has heretofore, for a valuable consideration been transferred and assigned to plaintiff, who is now the lawful owner thereof.

5.

That pursuant to an act passed by the Congress of the United States, entitled "An Act to regulate commerce," approved February 4th, 1887, and acts amendatory and supplementary thereto, and pursuant further to a ruling and order made and entered by the Interstate Commerce Commission on the 18th day of February, 1915, said Interstate Commerce Commission made and entered its order, defining, determining and construing the lawful and prevailing rate and weight governing and controlling said shipment, to-wit: the actual weight based upon the published tariff rate on "less than car-load" shipment and to which defendant carrier was by law entitled and plaintiff alleges that the amount so paid defendant by said owner was paid without said owner's acquiescence and was un-awful and unjust.

That such true and lawful tariff rate has at all times been duly and regularly published and filed with the Interstate Commerce Commission.

6.

That plaintiff has been compelled to employ counsel to institute this action for which plaintiff has been compelled to contract and employ counsel and obligate himself for a reasonable attorney's fee herein, and that the sum of $20.00 is a reasonable fee for such services, to plaintiff's further damage in the sum of $20.00.

7.

That said claim has heretofore been duly and regularly presented and filed with said defendant and disallowed and refused.

Wherefore, plaintiff prays judgment against the defendant for the sum of fifteen dollars and seventeen cents ($15.17) and a reasonable attorneys' fee in the sum of twenty dollars ($20.00), and for his costs herein incurred.

E. H. HOGUELAND AND
P. C. DORENITZER,
Attorneys for Plaintiff.

Filed in the United States District Court, May 12, 1915.

(See stipulation, page 43 of this Transcript, as to remaining counts.)

3 (*Record Entry of Filing of Demurrer November* 1, 1915.)

This day comes defendant and files demurrer.

(Demurrer.)

Now on this day comes defendant and demurs to each one of the 147 counts in and composing the petition in the above entitled cause, and to each and every paragraph and portion of each one of said 147 counts, for the following reasons, to-wit:

(1) Because each of said counts shows upon its face that the pretended claim which is made the basis of such count accrued more than two years prior to the institution of this action, and by reason thereof plaintiff is not entitled to recover upon such count.

(2) Because each of said counts fails to state facts sufficient to constitute a cause of action.

(3) Because each of said counts fails to state facts sufficient to entitle plaintiff to the relief prayed for in his petition, or to any relief whatsoever.

Wherefore, defendant prays that each one of said 147 counts and each paragraph and portion of said 147 counts be adjudged insufficient.

CYRUS CRANE,
GEO. J. MESEREAU,
Attorneys for Defendant.

Filed in the United States District Court Nov. 1, 1915.

(*Record Entry, Demurrer Overruled March* 27, 1916.)

This day the demurrer heretofore filed herein coming on for hearing, the same is argued and submitted to the court, and the court being fully advised in the premises, it is ordered that said demurrer be overruled; to which ruling of the court defendant at the time excepts; it is further ordered that defendant be granted 20 days within which to answer.

(*Record Entry of Filing of Answer April* 15, 1916.)

This day comes defendant and files answer.

(*Answer.*)

Now on this day comes defendant, and for its answer to the petition in the above entitled cause, and to each one of the one hundred and forty-seven counts composing said petition, this defendant denies each and every allegation in said petition, and in each and every one of the one hundred and forty-seven counts in said petition contained.

Wherefore, having fully answered said petition and each and every one of the one hundred and forty-seven counts in said petition contained, defendant prays to be discharged with its costs.

4 Further answering said petition and each and every one of the one hundred and forty-seven counts in said petition contained, this defendant states that each and every one of said one hundred and forty-seven counts in said petition contained is based upon the Act of Congress passed by the Congress of the United States, entitled "An Act to Regulate Commerce," approved February 4th, 1887, and acts amendatory and supplementary thereto; that it is expressly provided in and by the said act to regulate commerce that all complaints for the recovery of damages shall be filed with the commission (meaning thereby the Interstate Commerce Commission) within two years from the time the cause of action accrues, and not after; that said provision was in full force and effect at all the times in each one of said one hundred and forty-seven counts in said petition contained referred to; that no complaint for the recovery of damages on account of the matters and things set out in either one of all said one hundred and forty-seven counts in said petition contained, was filed with said commission within two years from the time the alleged cause of action in such count set out accrued; that by reason of the premises the right to recover damages by reason of the matters and things set out in each of said one hundred and forty-seven counts in said petition contained, if such right ever existed, has now become and is absolutely barred by limitation under the above mentioned provision in said act contained, and that by reason of the premises, plaintiff is not entitled to recover under either one of said one hundred and forty-seven counts in said petition contained.

Wherefore, having fully answered said petition and each and every one of the one hundred and forty-seven counts in said petition contained, defendant prays to be discharged with its costs.

CYRUS CRANE,
GEO. J. MERSEREAU,
Attorneys for Defendant.

Filed in the United States District Court, April 15, 1916.

(*Record Entry of Filing Stipulation Waiving Jury Nov.* 19, 1917.)

This day come parties and file stipulation waiving jury.

(*Stipulation Waiving Jury.*)

It is hereby stipulated and agreed that a jury may be waived in above entitled cause.

BLACKMAR & BUNDSCHU,
Attorneys for Plaintiff.
CYRUS CRANE,
Attorney for Defendant.

Filed in the United States District Court, Nov. 19, 1917.

5 (*Record Entry, Trial, February* 20, 1918.)

This day this cause coming on for hearing the parties hereto appearing by their respective counsel; whereupon a jury having been heretofore waived herein, evidence is heard, argum-nts of counsel made and this cause submitted to the court and taken under advisement.

(*Record Entry, Judgment, July* 22, 1918.)

Now on this day this cause coming on to be heard upon plaintiff's petition and the answer thereto, the plaintiff dismisses the following counts of his petition: 2, 7, 9, 10, 11, 12, 14, 15, 17, 18, 19, 20, 21, 23, 26, 27, 28, 29, 30, 32, 34, 35, 38, 39, 40, 41, 44, 45, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 68, 69, 70, 71, 72, 73, 77, 78, 82, 84, 85, 86, 89, 91, 94, 95, 96, 99, 100, 104, 105, 108, 110, 111, 112, 115, 117, 119, 120, 121, 124, 126, 127, 128, 129, 131, 133, 134, 135, 136, 137, 138, 139, 142.

A jury having been waived by the parties hereto, and the court having heard the evidence and the arguments of counsel, and being fully advised in the premises, finds the issues for the plaintiff and against the defendant, upon each and every one of the remaining counts of plaintiff's petition, and does assess his damages as follows:

Count 1 at the sum of	$22.50
Count 3 at the sum of	52.87
Count 4 at the sum of	33.56
Count 5 at the sum of	9.35

Count 6 at the sum of 43.87
Count 8 at the sum of 32.14
Count 13 at the sum of 26.36
Count 16 at the sum of 14.09
Count 16½ at the sum of 52.87
Count 22 at the sum of 32.14
Count 24 at the sum of 52.87
Count 25 at the sum of 5.12
Count 31 at the sum of 12.61
Count 33 at the sum of 33.29
Count 36 at the sum of 16.44
Count 37 at the sum of 27.79
Count 42 at the sum of 56.37
Count 43 at the sum of 17.14
Count 46 at the sum of 25.97
Count 47 at the sum of 8.41
Count 49 at the sum of 12.47
Count 64 at the sum of 4.86
Count 67 at the sum of 52.87
Count 74 at the sum of 2.56
6 Count 75 at the sum of 36.52
Count 76 at the sum of 52.87
Count 79 at the sum of 26.67
Count 80 at the sum of 41.31
Count 81 at the sum of 12.61
Count 83 at the sum of 37.15
Count 87 at the sum of 31.07
Count 88 at the sum of 38.38
Count 90 at the sum of 16.06
Count 92 at the sum of 35.02
Count 93 at the sum of 21.50
Count 97 at the sum of 2.12
Count 98 at the sum of 52.87
Count 101 at the sum of 14.38
Count 102 at the sum of 16.21
Count 103 at the sum of 44.05
Count 106 at the sum of 17.91
Count 107 at the sum of 52.87
Count 109 at the sum of 25.06
Count 113 at the sum of 52.87
Count 114 at the sum of 2.15
Count 116 at the sum of 52.87
Count 118 at the sum of 44.05
Count 122 at the sum of 71.16
Count 123 at the sum of 52.87
Count 125 at the sum of 62.93
Count 130 at the sum of 40.47
Count 132 at the sum of 40.47
Count 140 at the sum of 40.47
Count 141 at the sum of 40.47

aggregating in all the sum of one thousand seven hundred twenty-three dollars and ninety-three cents ($1,723.93).

The court further finds that the sum of three hundred dollars ($300.00) is a reasonable attorney's fee for the prosecution of this action.

Wherefore, it is considered and adjudged that the plaintiff have and recover the sum of one thousand seven hundred twenty-three dollars and ninety-three cents ($1,723.93) of the defendants, also an attorney's fee of three hundred dollars ($300.00) which is taxed as costs, and that plaintiff recover all other costs in this behalf expended; and that execution issue therefor.

AEBA S. VAN VALKENBURGH,
Judge.

(*Record Entry of Filing of Motion for New Trial, July 24, 1918.*)

This day comes defendant and files motion for new trial, the same is argued and submitted to the court and the court being fully advised in the premises doth overrule the same; to which ruling of the court defendant at the time excepts.

7 (*Motion for New Trial.*)

Now on this day comes the defendant and moves the court to make and enter an order setting aside the judgment and granting a new trial upon the following grounds, and for the following reasons, to-wit:

1. The court erred in refusing to give and in overruling the defendant's declaration of law or demurrer at the close of the evidence as to each and every one of the following counts in plaintiff's petition: 1, 3, 4, 5, 6, 8, 13, 16, 16½, 22, 24, 25, 31, 33, 36, 37, 42, 43, 46, 47, 49, 64, 67, 74, 75, 76, 79, 80, 81, 83, 87, 88, 90, 92, 93, 97, 98, 101, 102, 103, 106, 107, 109, 113, 114, 116, 118, 122, 123, 125, 130, 132, 140, 141.

2. Because the court erred in allowing an attorney's fee in the sum of three hundred dollars ($300.00) or any other amount.

3. Because the judgment is excessive.

4. Because upon the entire record the judgment should have been for the defendant.

5. Because the cause of action, if any, in each and every one of the counts in plaintiff's petition are and were barred by the Statute of limitations applicable in such cases.

6. Because the judgment is otherwise defective, irregular and contrary to law.

CYRUS CRANE,
HUGH E. MARTIN,
Attorneys for Defendant.

Filed in the United States District Court July 24, 1918.

(*Record Entry of Filing of Petition for Writ of Error, Jan.* 10, 1919.)

This day comes the defendant herein by its attorneys and files petition for writ of error.

(*Petition for Writ of Error.*)

Now comes defendant, The Kansas City Southern Railway Company, herein and alleges that on the 22nd day of July, 1918, this court entered judgment herein in favor of the plaintiff and against this defendant in the sum of $1,723.93 with interest at the rate of six per cent per annum and all costs of suit, including an attorney's fee of $300, the plaintiff's attorney, in which judgment and proceedings, certain errors were committed to the prejudice of this defendant, all of which will in detail appear in the assignment of errors which is filed with this petition;

Wherefore, the said Kansas City Southern Railway Company prays that a writ of error issue for the correction of the error so complained of; that a transcript of the record proceedings and pleadings in this case, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit in order that said judgment
8 so rendered may be reversed and that judgment may be rendered in favor of this defendant and against said plaintiff.

CYRUS CRANE,
HUGH E. MARTIN,
JOHN H. LATHROP,
Attorneys for Defendant, The Kansas City Southern Railway Company.

Filed in the United States District Court Jan. 10, 1918.

(*Record Entry of Filing of Assignment of Errors, Jan.* 10, 1919.)

This day comes the defendant herein by its attorneys and files assignment of errors in this cause.

(*Assignment of Errors.*)

Comes now defendant, the Kansas City Southern Railway Company, by its attorneys and in connection with its petition for writ of error, says that in the record and proceedings of this cause, and during the trial thereof in the said District Court, error inte-vened to its p-ejudice and it therefore makes the following assignment of errors upon which it will rely in the prosecution of a writ of error from the Circuit Court of Appeals for the Eighth Circuit:

I.

The court erred in overruling the demurrer of the defendant at the close of all the evidence, in words and figures as follows, to-wit:

At the close of all the evidence the court declares the law to be that under the pleadings and the evidence the plaintiff is not entitled to recover upon the following counts of plaintiff's petition; or upon any one of them.

Counts 1, 3, 5, 6, 8, 13, 16, 16½, 22, 24, 25, 31, 33, 36, 37, 42, 43, 46, 47, 49, 64, 67, 74, 75, 76, 79, 80, 81, 83, 87, 88, 90, 92, 93, 97, 98, 101, 102, 103, 106, 107, 109, 113, 111, 116, 118, 122, 125, 130, 132, 140, 141.

II.

Court erred in rendering and entering a judgment in this cause on each count of the petition above referred to in favor of the plaintiff and against the defendant.

III.

The court erred in allowing an attorney's fee in the sum of $300.00 or any other amount.

IV.

The court erred because the judgment is excessive.

9

V.

The court erred in that cause of action, if any, in each and every one of the counts in plaintiff's petition are and were barred by the statute of limitations applicable in such cases.

VI.

The court erred because the judgment is otherwise defective and contrary to law.

VII.

The court erred in entering judgment for the plaintiff because upon the entire record and the evidence and under the law, judgment should have been entered herein for the defendant.

VIII.

The court erred in overruling defendant's motion for a new trial.

CYRUS CRANE,
HUGH E. MARTIN,
JOHN H. LATHROP,
Attorneys for Defendant, The Kansas City Southern Railway Company.

Filed in the United States Circuit Court Jan. 19, 1919.

(*Order Allowing Writ of Error.*)

In pursuance of the writ of error filed herein by The Kansas City Southern Railway Company, it is hereby ordered that a writ of error be and it is allowed from the United States Circuit Court of Appeals for the Eighth Circuit upon the filing by the said defendant of a good and sufficient bond in the sum of three thousand dollars ($3,000.00), to be approved by the court, condition- that the said defendant prosecutes the said writ with *the facts* and answers all damages and costs if it fails to make its plea good, and upon the filing of said bond said judgment shall be superseded.

Dated this 10th day of January, 1919.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the United States District Court Jan. 10, 1919.

(*Record Entry of Filing of Bond on Writ of Error, Jan. 10, 1919.*)

This day comes the defendant by its attorneys and files bond on writ of error.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, The Kansas City Southern Railway Company, a corporation organized and existing under the laws of the State of Missouri, as principal, and American Surety Company of New York as surety, are held and firmly bound
10 unto Harry B. Wolf in the sum of three thousand dollars ($3,000.00) in lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, successors and assigns, jointly and severally, firmly by these presents.

Whereas, in the above-entitled cause said The Kansas City Southern Railway Company has prosecuted its writ of error to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment rendered in said cause;

Now, therefore, the condition of this obligation is such that if The Kansas City Southern Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY.
By CYRUS CRANE,
Its Attorney in Fact.
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK.
Surety.
By A. T. ZIMMERMAN,
Resident Vice-President.

Attest:
M. WIER,
Resident Ass't Secretary.

Approved this 10th day of January, 1919.
ARBA S. — VALKENBURGH,
District Judge.

Filed in the United States District Court Jan. 10, 1919.

(*Record Entry Allowing Time to File Bill of Exceptions, January* 10, 1919.)

This day come the parties herein by their attorneys and by agreement it is ordered by the court that the defendant be given until March, 1919, to file Bill of Exceptions.

(*Record Entry of Filing of Bill of Exceptions, March* 1, 1919.)

This day comes the defendant herein by its attorneys and files Bill of Exceptions herein; stipulation and agreement for filing transcript with Clerk of United States Circuit Court of Appeals filed.

(*Bill of Exceptions.*)

Be it Remembered, that on the 20th day of February, 1918, this cause coming on to be heard before the Honorable Arba S. Van Valkenburgh, Judge of said court, in chambers, at Kansas City, Missouri, without the presence of a jury, the plaintiff appearing by Charles M. Blackmar, Esquire, of Messrs. Blackmar & Bundschu, and the defendant appearing by John H. Lathrop, Esquire,
11 and Hugh Martin, Esquire, of Messrs. Lathrop, Morrow, Fox & Moore, the following proceedings were had and entered of record on said day, to-wit:

Thereupon the plaintiff, to sustain the issues on his part, offered and introduced evidence, oral and documentary, as follows, to-wit:

HARRY B. WOLF, the plaintiff, produced as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blackmar:

Q. State your name to the court.
A. Harry B. Wolfe.
Q. And your occupation, Mr. Wolfe?
A. Railway traffic expert.
Q. How long have you been in the traffic business?
A. I was connected with a railroad company for a period of 11 years, and have been in the independent field handling for merchants for the past 6 years.

Q. Are you familiar with this tariff mentioned in plaintiff's petition here, known as the Missouri Valley Rule Circular?
A. Trans-Missouri Rule Circular?
Q. Yes.
A. Yes, sir.
Q. Have you that circular there?
A. Yes, sir.

Mr. Lathrop: We object to the introduction of that rule until we find out more definitely what that is.
Mr. Blackmar: It is stipulated in there that this may be introduced.
Now, I offer in evidence Rule 1015, Trans-Missouri Rule Circular No. 1-B, I. C. C. No. 261, Kansas City Southern Railway Company, classified No. 13-B. That, Your Honor, is the rule that I read to you here just a moment ago.

Q. Now, Mr. Wolf, in your experience here as a traffic man, what construction has been placed upon this rule with reference to strawberries?

Mr. Lathrop: I object to that, as calling for an improper conclusion of the witness, not in any way binding upon this defendant, not having anything to do with the issue in this case.
The Court: Well, that is rather general.
Mr. Blackmar: Well, I will limit it to the Kansas City Southern Railway Company.
Mr. Lathrop: Same objection.
The Court: What is that?
Mr. Lathrop: I make the same objection; and that the witness is not shown properly qualified to testify.
The Court: Well, that is a different objection.

Q. Mr. Wolf, do you know what construction the Kansas City Southern Railway Company has placed upon this rule that has just been offered in evidence?
A. I do.
Q. Now, what is that construction?

12 Mr. Lathrop: I object to that, as too general; incompetent, irrelevant and immaterial; and calling for an improper conclusion of the witness; and hearsay testimony.

The Court: How do you know what they placed on it?
The Witness: For the simple reason that I had occasion to consult with various officials of the Kansas City Southern Railway Company. Further than that, why, I handled railroad claims on the very same commodities and filed them with the Kansas City Southern, and went into the matter of the tariff with them as to the construction, and it was agreed to by them that was correct, and at later dates they paid the claims. Then on other occasions I went to the local freight agent of the Kansas City Southern on shipments that were coming in and explained the situation to them and had proper charges assessed.

The Court: Well, if you had claims adjudicated by their claim department, by the officers of the Kansas City Southern, and they passed upon those claims, involving a construction of this, why, you may state what that was.

Q. All right, now, Mr. Wolfe, just state what—in full what that was.

The Court: Objection overruled.

(To which ruling of the court the defendant, by its counsel, then and there duly excepted and still excepts.)

A. The construction they placed upon the tariff was that the transportation companies were compelled to handle the strawberries in their fastest trains, that they were to give them proper refrigeration, and assess revenue on basis of actual weight, at a first-class rate, which is the less than car load rate applying on strawberries, observing the minimum charge of 10,000 pounds at the second-class rate.

Q. Did you take this matter up with any of the officials of the Kansas City Southern?

A. Yes, sir.

Q. What officials were they? Who were they?

A. Mr. D. R. Dailey, at that time Freight Claim Agent of the Kansas City Southern, Mr. W. G. Buckner, who was at that time chief clerk to the freight claim agent of the Kansas City Southern, who is now freight claim agent, with Mr. Hamilton, the chief clerk to the general freight agent of the Kansas City Southern—or at that time was chief clerk, and is now assistant general freight agent of the St. Louis, Iron Mountain & Southern Railway Company, with Mr. Rodgers, who is now, I believe, chief clerk to the general freight agent of the Kansas City Southern, and at that time was chief rate clerk, and also Mr. Dailey's rate clerk, whose name I don't remember.

Q. And the result of that was that the claims which you presented upon the basis contended for in this petition were paid?

A. There were in the neighborhood of 100 claims of like character that were paid. The situation was identical to the claims in which—in this cause.

Q. Now, since this suit was instituted—

13 Mr. Lathrop (interrupting): Just a moment. We object to that, as being absolutely immaterial, and not competent in this case.

The Court: Oh, no; not competent in this case—because they paid one claim they ought to pay this. It simply bears upon the question of what construction they gave to this rule. If it is an ambiguous and doubtful rule, that is always proper.

(To which ruling of the court the defendant, by its counsel, then and there duly excepted and still excepts.)

Q. Now, since this suit was instituted, have there been similar accounts and claims to this paid afterwards?
A. Yes, sir.

Mr. Lathrop: I object to that, as absolutely immaterial.
The Court: I think that is infringing upon the other question, and the objection will be sustained to that.

(To which ruling of the court the plaintiff, by his attorney, then and there duly excepted, and still excepts.)

Mr. Blackmar: In connection with Mr. Wolf's testimony, I want to offer in evidence the opinion of the Interstate Commerce Commission in a case entitled "In the Matter of the Investigation and Suspension of the Advances in Refrigeration Charges between Points Located on the Kansas City Southern Railway Company, the Arkansas Western Railway Company, the Texarkana & Fort Smith, to and from Points on Connecting Lines," reported in I. C. C. No. 26, at page 617.

Q. Now, Mr. Wolf, you have examined this opinion?
A. Yes, sir.
Q. And this opinion is in connection with the same rule we have offered in evidence?

Mr. Martin: If Your Honor please, that opinion speaks for itself.
The Court: Yes; I don't think he can testify about that. You can introduce that as a matter in your argument—the construction placed upon it by the Interstate Commerce Commission, and it will have to speak for what it is.
Mr. Blackmar: Yes, sir.
The Court: That, however, I should judge would be a part of your presentation of the case, after you get your case in. You do not have to introduce it. I take judicial notice of the Interstate Commerce Commission reports.
Mr. Blackmar: That is all.

Cross-examination.

By Mr. Lathrop:

Q. Mr. Wolf, you are the assignee of these claims, are you?
A. Yes, sir.
Q. Do you know these various companies and persons that are named as shippers in the petition?
A. Do I?
Q. The ones that have assigned their claims to you?
A. Know them through business association.
Q. Through business association?
A. Yes, sir.
Q. In what general character of business are they engaged? Wholesale produce business?
A. They handle produce; yes, sir.

Q. Do you know who paid the freight charges on these shipments which are involved?

A. Yes, sir; I do. I thought——

Q. (Interrupting.) Who paid them?

A. I thought that was stipulated. I didn't bring all the evidence on that. I could have brought more evidence, but it was stipulated.

The Court: Well, I gained the impression from the statement of counsel as to what the issues contended upon were, that was stipulated.

The Witness: I am willing to get it.

The Court: Are you bringing this under the Spiller case, now, Mr. Lathrop?

Mr. Lathrop: That was what I had in mind. That is what I mentioned the last time we were up here. They claimed they had a case in the Supreme Court of the United States contrary to the Spiller case, I have never seen that.

Mr. Blackmar: There is. They said Judge Carland was wrong.

The Court: Then in other words, that makes out a case of damage, to show there was a different rate paid from the local—in a case—that is a case of an unreasonable rate paid. I am not sure that is limited to that question, but wherever they paid a rate which was higher than they should have paid, the mere fact they did that presumes a damage. Judge Carland said it didn't you had to prove it.

Q. At any rate, then, Mr. Wolf, you haven't got that information here on the payment of the freight charges?

A. The reason that I haven't is because it was stipulated that the parties who had assigned them had paid the freight, and I could have brought the evidence, but I—I know that they did, but then I am just stating the reason I can't.

Q. You know who did?

The Court: Mr. Wolf is taking the unusual precaution of a witness of saying he knows a fact, but hasn't at hand the evidence of it. That is refreshing, because it is not ordinarily done.

The Witness: The fact it was stipulated, Your Honor.

The Court: I understand, Mr. Wolf. Your position is perfectly impregnable.

Mr. Lathrop: I don't know. Did he take quite the same position when Mr. Blackmar was asking the questions?

The Witness: I think I did.

Mr. Blackmar: I didn't notice him changing.

The Court: His admission is against interest, so he is to be credited with it.

Mr. Lathrop: Yes; that is right.

I believe that is all.

(Witness excused.)

15 WILLIAM C. MICHAELS, produced as a witness on behalf the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blackmar:

Q. Mr. Michaels, will you state your name and your profession
A. W. C. Michaels, attorney, Kansas City, Missouri.
Q. You are a member of the bar of this court?
A. Yes, sir.
Q. Have you examined the petition in this case?
A. Yes, sir.
Q. What, in your opinion, Mr. Michaels, would be a reasonal fee for the preparation of the petition in this case and the preparati of the case for trial?
A. Well, I haven't examined the petition critically enough know what preparation is necessary, Mr. Blackmar. You will ha to supplement that. If you want the fee for the whole case, couldn't answer it.
Q. Well, for writing the petition, preparing the evidence in t case, preparing an agreed statement of facts, which was signed counsel and practically covers the entire case, brieting the case the law, which consumed some three days, and the trial of the ca here.

The Court: What is the amount involved?
The Witness: Yes.

Q. (Continuing:) The amount involved is about $2,500.
A. The petition seems to be very voluminous. The pages are n numbered. I don't know how many pages. There seems to be ov 50. I should say from $500 to $700, about 20 or 25 per cent of t amount involved, I should think, in a case of this kind, would reasonable. That is my view.
Q. Well, in your basis of the fee, of course you take into consi eration the amount of work and also the amount involved?
A. The amount involved, yes, sir, and the technical character the work, and the amount of time put in in the preparation.

Cross-examination.

By Mr. Martin:

Q. Mr. Michaels, are you well acquainted with Mr. Blackmar?
A. Oh, very well.
Q. You know his official position with the city?
A. Yes, sir.
Q. Do you know what his compensation from the city is p month?
A. I think—I am not certain; no, sir. I am not certain wh that is.
Q. Do you know how much it is per year?

Mr. Blackmar: I will state to you it is $3,250 a year.

Q. With that statement of counsel, do you think the preparation of this petition and the work that has been put on it is worth two months of his time?

A. Well, Mr. Martin, I didn't figure it on Mr. Blackmar's—the fact is, Mr. Blackmar's name is not even signed to this peti-
16 tion. I notice that. My opinion is based upon the—what I conceive any attorney is entitled to, regardless of what official position he might hold in any job.

Q. Is that the usual, customary fee?

A. No, I don't know what the usual, customary fee would be in this kind of a case. I just simply based it upon what I estimate the amount of work he put in in preparing the case would be. I don't think I should want to charge less than $500.

Q. Did you ever have a similar case of this character?

A. Never did. It is a case of first impression with me. That would bring the fee a little larger perhaps. The second time you go over it it is easy. Is that all?

Mr. Martin: That is all.

(Witness excused.)

S. R. DUCKETT, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination

By Mr Blackmar

Q. State your name to the court.

A. S. R. Duckett.

Q. Your occupation, Mr. Duckett?

A. Traffic expert.

Q. And with whom are you connected now?

A. At the present time I am with the Cardwell Grain Company.

Q. How much experience have you had in connection with railroad freight matters?

A. Sixteen years.

Q. At one time were you connected with the Topeka Traffic Bureau?

A. For 5 years, since its inception. Make it Traffic Association.

Q. During that time did you ever have the matter of the construction of this rule up with the officials of the Kansas City Southern?

A. Yes, sir.

Q. Do you know Mr. Holden's signature, the vice-president of the Kansas City Southern?

A. Yes, sir.

Q. Was that letter which I show you and have asked the stenographer to mark——

(Thereupon two papers were marked by the reporter as Plaintiff's Exhibits A and B respectively.)

Q. (Continuing:) Is that Mr. Holden's signature on Exhibit
A. (After examining exhibit.) Yes, sir.
Q. That letter was written in response to Exhibit B, which
stenographer has marked?
A. (After examining exhibit.) Yes, sir.

By Mr. Lathrop:

Q. Did you write this Exhibit B, Mr. Duckett?
A. The letter was dictated by Mr. Driscoll. At that time I
assistant secretary. I heard the letter dictated.

By Mr. Blackmar: I offer in evidence Exhibits A and B.

Mr. Lathrop: We object, for the reason they are who
17 incompetent, irrelevant and immaterial, not tending to pr
or disprove any issue in this case.

The Court: Very well, I will receive them subject to objecti
and confer with you afterwards.

The exhibits referred to are in words and figures as follows:

(PLAINTIFF'S EXHIBIT B.)

Topeka, Kansas, Sept. 27, 1912.

Mr. J. F. Holden, Vice Pres.,
The Kansas City Southern Ry. Co.,
Kansas City, Mo.

DEAR SIR:

I have recently had some correspondence with Mr. Mitchell und
his file H-2252-C having reference to the protection of the less
load rate on strawberries from your points to Topeka, Kansas
The situation briefly stated is this:

The rate on berries carloads from Neosho to Topeka at the ti
of movement was 59 cents per 100 pounds, refrigeration rate 21 ce
per 100 pounds or total 80 cents.

Now the first class rate (or less car load rate) was only 49 ce
and presents an unusual situation, the L. C. L. rate being 10 ce
lower than the carload rate.

Then item 1095 of Trans-Mo. circular No. 11-C provides th
refrigerator cars will be furnished for less car load freight at t
L. C. L. rates with a minimum of 10,000 pounds at 2nd class, a
K. C. S. classification No. 11-C, Item 19, second paragraph from t
bottom of page 7 carries a similar provision—Under such circu
stances no charge will be made for initial icing or for re-icing.

My claims were filed direct with the Interstate Commerce Co
mission, informally, and your company has indicated your willin
ness to protect the less carload basis, but decline to furnish the i
free although in two different tariffs on file with the Interstate Co
merce Commission—you say that no charge will be made for ici
or re-icing.

Before turning this into a formal complaint, I would be glad

you would call for Mr. Mitchell's file and I believe that you can not do otherwise than authorize payment on basis of the lowest legal published rate—viz: protection of the first class rate at actual weight, with minimum of 10,000 pounds at 2nd class rate, no charge for initial icing or for re-icing.

Your legal department will no doubt acquiesce in this opinion. I would appreciate an early reply as I probably will leave for Washington within 10 days and desire to have this settled before that time.

Yours truly,

_____,
Commissioner.

18 (PLAINTIFF'S EXHIBIT A.)

September 30th, 1912.

Mr. H. D. Driscoll,
Commissioner, Topeka Traffic Assn.,
Topeka, Kansas.

DEAR SIR:

Answering your personal letter of September 27th, beg to advise that I have looked into this subject, and believe, according to tariffs published, that there is nothing for us to do but to pay your claims for refrigeration; although I do not hesitate to say, it seems to be unreasonable that we should be in a position of doing for L. C. L. shipments what we are not expected to do for C. L. shipments.

If you will send your claims to Mr. H. A. Weaver, Assistant General Freight Agent, with whom I have discussed the subject, they will be taken care of.

Yours truly,
(Signed) J. F. HOLDEN,
Vice President.

cc Mr. Weaver.

By Mr. Blackmar:

Q. Mr. Duckett, the matters referred to in those letters are matters in connection with the construction of the rule which has been offered in evidence in this case?

A. Yes, sir.

Q. Did you handle any of these claims personally with the officials of the Kansas City Southern Railway Company?

A. Yes, sir.

Q. Now, just tell His Honor what construction those officials placed upon this section of this rule, and who the officials were.

Mr. Lathrop: I object to that, as calling for an improper conclusion of the witness.

The Court: Well——

Q. (Interrupting.) Well, what was done in connection with tha matters?

The Court: Yes. Show what conduct of business it was that in volved, if it did involve, any construction of this rule. Not wha their personal opinions were.

Mr. Martin: We object to a lot of collateral issues. Here is a man put on the stand and he is asked a blanket question: "Did you ever have any negotiations in regard to similar shipments to these." Now, that, in the first place, calls for a conclusion in regard to dif ferent kinds, whether it is like it or not, and we think, in the event we want to upset that, we would have to go into all these question of the proposition whether they were different circumstances or not I don't think it is a proper way to prove construction of a rule.

The Court: The only proper way to prove construction, i
19 I understand, is some transaction in which the construction of this rule was involved, and a decision based upon a con struction of the rule.

Mr. Martin: Yes, sir.

The Court: Now, that in itself does not involve the question o the identity of the circumstances, nor would it be of any value at al simply because a settlement was made, if it was not based upon tha construction of the rule. Well, a construction of the rule—some cas in which the rule applied or was felt to apply but whether it di apply or not by the official making this decision, the mere fact ther were some claims presented and claims were paid, unless it involve a construction of the rule, manifestly why of course would not b pertinent, nor would any opinion—oral opinion just given on it b some man engaged in the operating department of the Kansas City Southern road, I wouldn't think that would be proper. Here is a case that was put up to the man who had the say so, in which wa set out the theory that was claimed. There I think that is pertinen construction. I don't know what the situation is, involved. I wil rule accordingly when I pass on it, according to whether I conceiv it is properly within the rule of construction.

A. Claims involving approximately $4,000 were filed under th construction of the tariff placed upon it by ourselves and paid by th Kansas City Southern, on the authority of Mr. Holden, Mr. Mitchell and through the office of the Freight Claim Agent, Mr. Dailey.

Q. Mr. Duckett, what roads run into Topeka?

A. Four lines: A. T. & S. F.; Missouri Pacific; Chicago, Rock Island and Pacific, and Union Pacific. Also the Leavenworth & Topeka.

Q. Now, all of those roads in the movement of strawberries from points on the Kansas City Southern are subject to the rule which has been offered in evidence here?

A. Yes, sir.

Q. So that your discussion of this matter with the officials of the Kansas City Southern necessarily involved an interpretation of this rule?

A. Yes, sir.

Mr. Lathrop: Wait a minute. I object to that. I think it is very leading and calls for a conclusion of the witness. Going into collateral matters.

The Court: Well, now, I don't think that is especially—I understood these were claims made of the Kansas City Southern?

Mr. Blackmar: Yes, sir.

The Court: Now, as to what these other roads thought or did about it, of course that is unimportant. What you are asking him would evidently involve the construction of some joint traffic arrangement, which we haven't before us. If there is any contention about it, why, that would be a matter that would have to be proved. I take it that any delivery by roads in Topeka of traffic that comes over the Southern would involve in some measure any tariff affecting the rates upon the Southern under a joint traffic agreement, but I don't see any necessity of going into that. The court knows that is so, but it would have to be shown as a matter of practice and relied upon.

The matters referred to in Mr. Holden's letter and in the communication which has been offered in evidence here are matters which involve the same rule that has been offered in evidence here?

A. Yes, sir.

Q. Now, after you presented these claims to Mr. Holden, what was done by the Kansas City Southern in connection with those claims?

A. They were paid. He authorized payment.

Q. Did the Kansas City Southern, during the time the shipments mentioned in those papers moved, maintain any refrigerator car service, less than car load, at these points down there?

Mr. Lathrop: I object to that as wholly incompetent, irrelevant and immaterial. This witness is not shown properly qualified to testify.

The Court: Well, that is true. He has not been shown. What is the object of that, Mr. Blackmar?

Mr. Blackmar: I just wanted to be sure that I was entirely within the rule here. This witness has made an investigation of it and knows.

The Court: Well, let him state what this investigation was.

Q. You made an investigation of that, did you, Mr. Duckett?

A. The investigation was made and the information has been developed at one or two hearings before the Interstate Commerce Commission, and again before the master of chancery. The information was really developed here before the Interstate Commerce Commission.

Mr. Blackmar: Never mind, then, Mr. Duckett. I will prove that by another witness.

That is all I think I want to ask Mr. Duckett.

Recross-examination.

By Mr. Lathrop:

Q. How about this Topeka Traffic Association? What kind of an association or body is that?

A. It is an association of merchants, not organized for profit, maintained by payments of yearly dues, similar to the commercial club or other organization.

Q. They have counsel in these various matters?

A. Yes, sir.

Q. And legal steps in connection with these matters are taken by counsel specially or regularly employed for that purpose?

A. Regularly employed; yes, sir.

Q. Regularly employed. I notice here in this letter. Exhibit B, directed to Mr. J. F. Holden, which you say is regard to claims of similar character, that you say "my claims were filed direct with the Interstate Commerce Commission informally." That is a fact, is it? Those claims were so filed with the Interstate Commerce Commission?

A. Yes, sir; and the Interstate Commerce Commission took up with the various roads involved——

21 Q. (Interrupting.) Well, I didn't ask you about that. I just ask you if they were filed there.

A. Yes, sir.

Q. And they were field within the two-year period of reparation claims?

A. Why, naturally they would be, if filed with the Interstate Commerce Commission.

Q. Yes, sir. Of course you didn't do that without a reason for it. You believe that was necessary?

A. It was done to protect our interests in case it became necessary to go before the Interstate Commerce Commission.

Q. What do you mean by "protecting your interests," Mr. Duckett?

A. In the event that payment had been declined, we wanted the claims filed with the commission to stop the running of the statute of limitations, in order that we could bring formally the complaint.

Q. In order to bring formal complaint?

A. Before the Interstate Commerce Commission.

Q. Before the Interstate Commerce Commission?

A. I say our interests. I should say the merchants' interests. We don't have any interest.

Q. You mean the interests of the people you represented?

A. Yes, sir.

Q. And of course this letter states that the claims were filed direct with the Interstate Commerce Commission, and after they had been filed, why then you took it up with Mr. Holden and this letter was written?

A. Yes, sir.

Mr. Lathrop: That is all.
Mr. Blackmar: That is all, Mr. Duckett.

(Witness excused.)

HARRY B. WOLF, recalled for further examination as a witness in his own behalf, having been previously sworn, testified further as follows:

Redirect examination.

By Mr. Blackmar:

Q. Mr. Wolf, did you examine the tariff files of the Kansas City Southern and their other schedules to ascertain whether or not at the time these shipments moved they maintained a less than car load refrigerator service?
A. I did.
Q. Did you find they did?

Mr. Lathrop: Wait just a moment. I object to that question. The tariffs themselves, it seems to me, in that event, would be the best evidence.
The Court: Yes. Objection sustained.

(To which ruling of the court the plaintiff, by his counsel, then and there excepted and still excepts.)

A. There were none.

Mr. Blackmar: Well, Your Honor, if there are none, I
22 don't see how, very well, he could bring in the tariffs to show that matter.
The Court: Well, at least I think that the tariff, unless that is stipulated, ought to be the best evidence of whether it contains that or not.
Mr. Blackmar: Well, Your Honor, you see that involves the examination of all of their train schedules and all of their tariffs, probably, and there will—why, I can't tell how many there will be. A large number of them, and of course we can't bring all of them.
The Court: Well, I understand you couldn't bring all the records of the department here, but this is proving by somebody outside, particularly a party to the case, what is an official situation with respect to tariffs, but those things are ordinarily done by somebody that has got some custody of the records.

Q. Now, Mr. Wolf, you went down into southeastern Missouri?
A. Yes, sir.
Q. Or southwestern Missouri, where these strawberries originate?
A. Yes, sir.
Q. And you talked with the station agents down there?
A. Yes, sir.
Q. And with the division superintendent?

Mr. Lathrop: Now, I think it would be better not to lead this witness. Let him tell what he did.

Mr. Martin: Talking to the station agents and that kind of thing is not binding in this kind of case.

The Court: No; I don't think so, Mr. Blackmar. What is it you want to prove, the fact there was no tariff of that kind?

Mr. Blackmar: There was no less than car load refrigerator service.

The Court: Oh. Service?

Mr. Blackmar: Yes.

The Court: Well, that is not a thing that depends on tariffs.

The Witness: No.

Mr. Martin: Well, it depends——

The Court (interrupting): There might be a tariff and they didn't put the service on.

Q. Well, I will ask you this, Mr. Wolf, did the Kansas City Southern Railway Company at the time of these shipments maintain any less than car load refrigerator service from these strawberry points?

Mr. Lathrop: Wait a minute. I object to that as calling for an improper conclusion of the witness. He is not shown properly qualified to testify.

The Court: You may state the extent of his knowledge, upon which he bases any answer to that question. What investigation of any kind did you make?

A. In the first place, I went down into the territory in which these shipments originated and went to the agents, who of course received the shipments, and who had charge of shipping
23 them from these individual stations, among them Neosho and that vicinity, and asked them if they had ever had a less than car load refrigerator service schedule from that territory, that is, did they load cars in that manner in less than car load, and refrigerator schedule, and they claimed they did not.

The Court: Was this in view of making these shipments?

The Witness: Some of the shipments were to be made in the future, yes, sir. Some of these moved and others moved in the future. This was in the year 1911, and some of these shipments moved in 1912.

Q. Now, did you examine their train sheets——

Mr. Lathrop (interrupting): I move that testimony be stricken out, not tending to prove or disprove any issue involved.

The Court: He said he had his investigation.

The Witness: It would be the most natural investigation. In other words, when we follow shipments the agents are the only ones that know when they have anything of that kind.

Mr. Lathrop: I object to that.

The Court: I think this would be proper. If I go to the territory from which the shipments were made and go to the parties

with whom you would engage to make the shipments, and there was no service there and I couldn't get any service, I think that would have a tendency to show whether any such service was maintained. If a man goes to make a general inquiry about service of that kind which does not affect the active putting into effect of such service, why, he might get a casual and very undecisive answer about it.

Mr. Lathrop: I don't think Mr. Wolf means he went down there and investigated for the purpose of making the shipments.

The Witness: Some of the shipments were to be made. The reason I went there was the people I represent——

Mr. Lathrop: Did you represent them at that time?

The Witness: Yes, sir.

Mr. Lathrop: What company?

The Witness: Well, at first I represented them in the capacity of trying to tell them the cheapest rates. That was the purpose.

The Court: It may go in, subject to the objection. I will consider it.

To which ruling of the court the defendant, by its attorney, then and there duly excepted and still excepts.

The Witness: I might add after that the rule was taken out of the tariff, after that—after 1912.

The Court: You say this rule has since been abrogated?

The Witness: Yes, sir.

Q. Now, this matter of less than car load on refrigerator cars, did you also take that up with the officials of the Kansas City Southern? And if so, with what officials?

A. Yes, sir; I went to the traffic department here and talked to them about their service.

21 Q. Now, who?

A. With Mr. Hamilton.

Q. Who was Mr. Hamilton?

A. Mr. Hamilton was chief clerk to the general freight agent, and had charge of the entire files of the traffic department.

The Court: When did you do that?

The Witness: This was during the year 1911.

The Court: Well, what was your purpose in going to Mr. Hamilton?

The Witness: Well, for the reason I had gone—I had found this rate and they had never used it, they passed it by.

The Court: You mean you found this rule?

The Witness: Yes, sir; and they had been passing it by without giving it any attention.

Mr. Lathrop: Who?

The Witness: The railroad company.

The Court: Did you discuss this particular rule?

The Witness: Yes, sir, this individual rule. They took it out of this tariff.

The Court: You showed them the rule?

The Witness: Yes, sir; I showed them the rule, and explained to them, and they said: "We put it in, we didn't mean to."

Mr. Lathrop: We move that last statement be stricken out as n
tending to prove or disprove anything in this case.
The Court: Did they say they were or weren't observing that rul
The Witness: They said they had not been observing it by asse
ing charges, but if claims were filed they would have to observe
that they just simply had overlooked it.
The Court: Of course that rule presupposes a certain service und
it, that is, furnishing of cars and loading them at this minimum ra
or less than 17,000 rate and then the rating of the product under i
The Witness: Yes, sir.
The Court: Well, now, was that being done, or was anything sa
about that, whether that was being done?
The Witness: About whether they had been?
The Court: Or would or were?
The Witness: They stated they would observe it. They woul
accept this rule and accept the service, but they informed me at th
time the rule would be changed.
Mr. Lathrop: I move that be stricken out, as not a statement
any fact.
The Court: Ruling reserved.

Q. At that time did you discuss with this man the question whethe
or not they had a refrigerator car service, less than car loads?
A. Yes, sir; I asked him if there was a less than car load servic
down there. He said, "We have not"; and he went there
his schedules, went through, and we went through the files to
gether. In fact, he was trying to find something. That wa
his very purpose in going through the files.

Mr. Martin: It won't be necessary——
The Court: I understand you object to all this, and the ruling
reserved.

Q. Who sent you to Mr. Hamilton?
A. Mr. Hamilton was in the front office. He was chief clerk t
the general freight agent, and I had had—and he had signed the
letters which had been received regarding this matter prior to that
and he was in charge of the office at any time you would go into the
Kansas City Southern. He was the man that one discussed matters
of rates with.

Mr. Blackmar: That is all.
The Court: Any questions?
Mr. Lathrop: No.
The Court: That is all.
Mr. Martin: Excuse me. Let me ask a question.

Recross-examination.

By Mr. Martin:

Q. You say you went to every one of these towns in the Ozarks?
A. No, sir; I didn't say every one.

Q. I mean where these shipments came from.
A. Every one, no, sir; but I went in the vicinity. In other words, if there were trains they would have to pass through the station, I did go to it, for instance, Neosho, they were all——
Q. (Interrupting.) Just a moment. Just answer the questions.
A. No, sir; I didn't go to every town in the Ozarks; no, sir.
Q. I mean where these shipments originated.
A. Well, I went to Ne——
Q. (Interrupting.) Now, you can answer yes or no.
A. No; I didn't go to every station they originated; no, sir.
Q. You did go to Neosho, did you?
A. Yes, sir.
Q. And that was just about the only station you went to?
A. No, sir; it wasn't the only station I went to. I went to Joplin, I went to Gentry, Siloam Springs. If you will just pardon me, let me think, I will give you the names—Siloam Springs, Gentry, Decatur—they were the stations I went to. In other words, to the last of the first stations——

Mr. Martin (interrupting): I move then that the testimony in regard to all these other shipments not mentioned—not originating from these points in question be stricken out.
The Court: Well, the ruling will be reserved on that.
Mr. Martin: That is all.
Mr. Blackmar: That is all of our evidence.
The Court: Have you the agreed statement of facts?
Mr. Blackmar: I offer the agreed statement or stipulation of facts.

26 In the District Court of the United States Within and for the Western Division of the Western District of Missouri.

No. 4367.

HARRY B. WOLF, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

(*Stipulation.*)

It is hereby stipulated and agreed by and between Harry B. Wolf and The Kansas City Southern Railway Company, plaintiff and defendant in the above entitled cause.

1. That the Kansas City Southern Railway Company is now and at all times hereinafter mentioned has been a corporation doing business as a common carrier of passengers and freight for hire, wholly by railroad between points in the State of Missouri and points in the State of Kansas, and owning, operating and controlling cars and rolling stock and locomotives propelled by steam, upon its roadbed and owning its franchises and right- of ways and maintaining its offices and agents in said states and as such common carriers is sub-

ject to the provisions of the Act to regulate commerce approved February 4th, 1887, and acts amendatory thereof and supplementary thereto, provided for by the Congress of the United States.

2. That the shipments described in the items hereinafter set out in tabulated form below, opposite the number under the caption of "Count number" are the same shipments that are described in the petition or any amendment thereof, having a corresponding number, heretofore filed in this case by the plaintiff.

3. That where no description in the way of car number, etc., is given it is understood that the cause of action in such count is withdrawn or dismissed.

4. That the description of the shipments as to the commodity, date of origin, car reference, place of origin, place of destination, name of consignor, name of consignee, weight as assessed, freight charges as collected and actual weight, are true and correct, and the rate and freight charges as contended for by the plaintiff are correctly set out according to their basis, that is, they (plaintiffs) have not made any clerical error, and that if the plaintiff's contention prevails charges should be so assessed, but nothing said here binds the defendant to the proposition that such rates or freight charges are applicable to the shipments in question.

5. That the defendant did accept and transport over a portion of the route, and did participate in and receive a portion of the freight charges as collected, and that the persons or corporations or their agents, as set out in this petition or any amendment which has or may be filed as having paid the freight charges did so, and if there were excessive freight charges collected, they were entitled to reimbursement by reason thereof, and that they possessed the right to assign their title and interest in any such excessive freight
27 charges collected, and that they did assign their rights and interests to Harry B. Wolf, before the commencement of this suit, and he is the lawful owner thereof, and is entitled to reimbursement if it is found that excessive charges have been collected on the shipments in question.

6. That either plaintiff or defendant may introduce in evidence any tariff published by any railroad, bearing an Interstate Commerce Commission number, without the formality of having it certified to by the Secretary of the Interstate Commerce Commission.

7. That the rates on which charges were collected were published, together with the minimum weights, according to law, and are on file with the Interstate Commerce Commission, and are legal rates and legal minimum weights, whenever applicable.

8. That the rates as contended for by the plaintiff are lawfully published and are on file, according to law with the Interstate Commerce Commission, and they apply, based on the actual weight without regard to minimum and they can lawfully be used whenever they are applicable.

All Shipments Mentioned Hereunder Consist of Strawberries.

Count number.	Number of packages.	Date of origin.	Car reference.
1	540	May 17, 1910	CFX 10192
2 (withdrawn)	...	.....	.....
3	510	May 24, 1911	FGE 16105
4	510	May 19, 1911	FGE 16123
5	540	May 25, 1910	FGE 16168
6	534	May 26, 1912	FGE 16189
7 (withdrawn)	...	.....	.....
8	510	May 30, 1912	FGE 16348
9 (withdrawn)	...	.....	.....
10 (withdrawn)	...	.....	.....
11 (withdrawn)	...	.....	.....
12 (withdrawn)	...	.....	.....
13	510½	May 28, 1912	FGE 16462
14 (withdrawn)	...	.....	.....
15 (withdrawn)	...	.....	.....
16	528	May 14, 1910	FGE 16790
16½	510	May 21, 1911	FGE 16884
17 (withdrawn)	...	.....	.....
18 (withdrawn)	...	.....	.....
19 (withdrawn)	...	.....	.....
20 (withdrawn)	...	.....	.....
21 (withdrawn)	...	.....	.....
22	510	May 29, 1912	FGE 17317
23 (withdrawn)	...	.....	.....
24	510	May 26, 1911	FGE 17487
25	576	May 30, 1910	FGE 17113
28			
26 (withdrawn)	...	.....	.....
27 (withdrawn)	...	.....	.....
28 (withdrawn)	...	.....	.....
29 (withdrawn)	...	.....	.....
30 (withdrawn)	...	.....	.....
31	528	May 21, 1910	FGE 17748
32 (withdrawn)	...	.....	.....
33	510	May 29, 1912	FGE 17778
34 (withdrawn)	...	.....	.....
35 (withdrawn)	...	.....	.....
36	540	May 17, 1911	FGE 18100
37	545	May 21, 1910	FGE 18155
38 (withdrawn)			
39 (withdrawn)	...	.....	.....
40 (withdrawn)	...	.....	.....
41 (withdrawn)	...	.....	.....
42	506	May 20, 1910	FGE 18383
43	538	May 16, 1911	FGE 18449
45 (withdrawn)	...	.....	.....

Count number.	Number of packages.	Date of origin.	Car reference.
46	480	May 14, 1910	FGE 18517
47	540	May 17, 1911	FGE 18573
48 (withdrawn)	...	.....	.....
49	543	May 20, 1910	FGE 18644
50 (withdrawn)	...	.....	.....
51 (withdrawn)	...	.....	.....
52 (withdrawn)	...	.....	.....
53 (withdrawn)	...	.....	.....
54 (withdrawn)	...	.....	.....
55 (withdrawn)	...	.....	.....
56 (withdrawn)	...	.....	.....
57 (withdrawn)	...	.....	.....
58 (withdrawn)	...	.....	.....
59 (withdrawn)	...	.....	.....
60 (withdrawn)	...	.....	.....
61 (withdrawn)	...	.....	.....
62 (withdrawn)	...	.....	.....
63 (withdrawn)	...	.....	.....
64	570	May 8, 1911	FGE 19644
65 (withdrawn)	...	.....	.....
66 (withdrawn)	...	.....	.....
67	510	May 23, 1911	FGE 20280
68 (withdrawn)	...	.....	.....
69 (withdrawn)	...	.....	.....
70 (withdrawn)	...	.....	.....
71 (withdrawn)	...	.....	.....
72 (withdrawn)	...	.....	.....
73 (withdrawn)	...	.....	.....
29			
74	576	May 11, 1910	FGE 20750
75	505	May 24, 1912	FGE 20782
76	510	June 2, 1911	FGE 20938
77 (withdrawn)	...	.....	.....
78 (withdrawn)	...	.....	.....
79	528	May 19, 1910	FGE 21273
80	560	May 27, 1910	FGE 21273
81	528	May 15, 1910	FGE 21288
82 (withdrawn)	...	.....	.....
83	480	May 23, 1911	FGE 21322
84 (withdrawn)	...	.....	.....
85 (withdrawn)	...	.....	.....
86 (withdrawn)	...	.....	.....
87	510	May 26, 1910	FGE 18873
88	510	May 17, 1911	FGE 16356
89 (withdrawn)	...	.....	.....
90	564	May 30, 1910	FGE 21640
91 (withdrawn)	...	.....	.....

Count number.	Number of packages.	Date of origin.	Car reference.
92	510	June 1, 1910	FGE 22010
93	528	May 9, 1910	FGE 23052
94 (withdrawn)	...	...	...
95 (withdrawn)	...	...	...
96 (withdrawn)	...	...	...
97	576	May 18, 1910	FGE 22246
98	510	May 31, 1911	FGE 22325
99 (withdrawn)	...	...	...
100 (withdrawn)	...	...	...
101	510	May 23, 1910	FGE 22462
102	540	May 26, 1910	FGE 22520
103	540	May 15, 1911	FGE 22565
104 (withdrawn)	...	...	...
105 (withdrawn)	...	...	...
106	538	May 28, 1910	FGE 22768
107	510	May 20, 1911	FGE 22787
108 (withdrawn)	...	...	...
109	515	May 30, 1911	FGE 22930
110 (withdrawn)	...	...	...
111 (withdrawn)	...	...	...
112 (withdrawn)	...	...	...
113	510	May 17, 1911	FGE 23570
114	577	May 10, 1910	FGE 23139
116	510	May 19, 1911	FGE 23509
117 (withdrawn)	...	...	...
118	540	May 16, 1911	FGE 23777
119 (withdrawn)	...	...	...
120 (withdrawn)	...	...	...
121 (withdrawn)	...	...	...
122	435	May 21, 1909	FGE 18341
123	510	May 22, 1911	FGE 24172
124 (withdrawn)	...	...	...
125	388	May 12, 1911	FGE 24176
126 (withdrawn)	...	...	...
127 (withdrawn)	...	...	...
128 (withdrawn)	...	...	...
129 (withdrawn)	...	...	...
130	528	May 26, 1912	FGE 18702
131 (withdrawn)	...	...	...
132	528	May 27, 1912	FGE 20854
133 (withdrawn)	...	...	...
134 (withdrawn)	...	...	...
135 (withdrawn)	...	...	...
136 (withdrawn)	...	...	...
137 (withdrawn)	...	...	...

Count number.	Number of packages.	Date of origin.	Car reference.
138 (withdrawn)	...	.....	.....
139 (withdrawn)	...	.....	.....
140	528	May 22, 1912	FGE 24294
141	528	May 26, 1912	FGE 30776
142 (withdrawn)	...	.....	.....

Count number.	Consignee.	Freight charges as collected.	Actual weight.
1.	A. Grossenbach Co	$167.48	16,200 pounds
2.	.....	.....	.....
3.	Gilinsky Fruit Co	$142.80	15,300 pounds
4.	A. Grossenbach Co	$167.45	15,300 pounds
5.	Willman & Co	$105.14	16,200 pounds
6.	.....	$142.80	16,020 pounds
7.	.....	.....	.....
8.	Schmidt & Keihl	$167.45	15,300 pounds
9.	.....	.....	.....
10.	.....	.....	.....
11.	.....	.....	.....
12.	.....	.....	.....
13.	O. W. Butts	$163.20	15,300 pounds
14.	.....	.....	.....
15.	.....	.....	.....
16.	Anderson Fruit Growers & Strawberry Assn	$147.83	15,840 pounds
16½.	Gilinsky Fruit Co	$142.80	15,300 pounds
17.	.....	.....	.....
18.	.....	.....	.....
19.	.....	.....	.....
20.	.....	.....	.....
31			
21.	.....	.....	.....
22.	Schmidt & Keihl	$167.45	15,300 pounds
23.	.....	.....	.....
24.	Gilinsky Fruit Co	$142.80	15,300 pounds
25.	A. G. Zulfer & Co	$165.89	17,280 pounds
26.	.....	.....	.....
27.	.....	.....	.....
28.	.....	.....	.....
29.	.....	.....	.....
30.	.....	.....	.....
31.	F. C. O'Donoghe	$105.14	15,840 pounds
32.	.....	.....	.....
33.	S. G. Palmer & Co	$175.95	15,300 pounds
34.	.....	.....	.....
35.	.....	.....	.....
36.	Grainger Bros. Co	$142.80	16,200 pounds

Count number.	Consignee.	Freight charges as collected.	Actual weight.
37.	Schmidt & Keihl	$172.47	16,350 pounds
38.			
39.			
40.			
41.			
42	Snider-Trimble Co.	$142.83	15,180 pounds
43.	O. W. Butts	$142.80	16,140 pounds
45.			
46.	W. W. Copeland	$142.83	14,400 pounds
47.	Craig Barr Merc. Co.	$125.80	16,200 pounds
48.			
49.	Godfrey & Sons Co.	$167.48	16,920 pounds
50.			
51.			
52.			
53.			
54.			
55.			
56.			
57.			
58.			
59.			
60.			
61.			
62.			
63.			
64.	Trimble Brothers	$164.16	17,100 pounds
65.			
66.			
67.	Gilinsky Fruit Co.	$142.80	15,300 pounds
68.			
69.			
32			
70.			
71.			
72.			
73.			
74.	F. C. O'Donohue	$106.85	17,280 pounds
75.	O. W. Butts	$163.20	16,200 pounds
76.	Grainger Bros. Co.	$142.80	15,300 pounds
77.			
78.			
79.	R. W. Gees Com. Co.	$105.40	15,840 pounds
80.	Grainger Bros. Co.	$143.83	16,800 pounds
81.	Arona-Browne Fruit Co.	$105.14	15,840 pounds
82.			
83.	Grainger Bros. Co.	$142.80	14,400 pounds

Count number.	Consignee.	Freight charges as collected.	Actual weight.
84.			
85.			
86.			
87.	Ginocchio-Jones	$105.14	15,300 pound
88.	Haley & Lang	$163.20	15,300 pound
89.			
90.	Grainger Bros. Co.	$142.83	16,920 pound
91.			
92.	Schmidt & Keil	$167.48	15,300 pound
93.	Grainger Bros. Co.	$142.83	15,840 pound
94.			
95.			
96.			
97.	Hunt & Meek	$106.84	17,280 pound
98.	Grainger Bros. Co.	$142.80	15,300 pound
99.			
100.			
101.	W. W. Copeland	$142.83	15,300 pound
102.	Countryman & Co.	$163.23	16,200 pound
103.	Trimble Bros.	$142.80	16,200 pound
104.			
105.			
106.	Grainger Bros. Co.	$142.83	16,140 pound
107.	Gilinsky Fruit Co.	$142.80	15,300 pound
108.			
109.	O. W. Butts	$142.80	15,450 pound
110.			
111.			
112.			
113.	Gilinsky Fruit Co	$142.80	15,300 pound
114.	Hunt & Meek	$107.04	17,310 pound
116.	Gilinsky Fruit Co.	$142.80	15,300 pound
117.			
118.	Gilinsky Fruit Co.	$142.80	16,200 pound

33

119.			
120.			
121.			
122.	Callender-Vanderhoff Co.	$175.41	13,050 pound
123.	Gilinsky Fruit Co.	$142.80	15,300 pound
124.			
125.	C. A. Ford	$125.80	11,640 pound
126.			
127.			
128.			
129.			
130.	Ross Brothers	$134.30	15,840 pound

Count number.	Consignee.	Freight charges as collected.	Actual weight.
131.			
132.	Ross Brothers	$134.30	15,840 pounds
133.			
134.			
135.			
136.			
137.			
138.			
139.			
140.	Ross Brothers	$134.30	15,840 pounds
141.	Ross Brothers	$134.30	15,840 pounds
142.			

Count number.	Shipping points.	Destination.	Shipper.
1.	Neosho, Missouri	Milwaukee, Wis.	Southwest Mo. Fruit Gro. Assn.
2.			
3.	Neosho, Missouri	Omaha, Nebr.	Neosho Frt. Grs. Association.
4.	Neosho, Missouri	Milwaukee, Wis.	Southwest Mo. Frt. Grs. Assn.
5.	Anderson, Missouri	St. Joseph, Mo.	Anderson Frt. Grs. & Strawberry Association.
6.	Neosho, Missouri	Lincoln, Nebr.	Southwest Mo. Frt. Grs. Assn.
7.			
8.	Neosho, Missouri	Milwaukee, Wis.	Neosho Frt. Grs. Association.
9.			
10.			
11.			
12.			
13.	Decatur, Arkansas	Omaha, Nebr.	E. N. Plank.
14.			
15.			
16.	Anderson, Missouri	Lincoln, Nebr.	Anderson Frt. Grs. & Strawberry Association.
16½.	Neosho, Missouri	Omaha, Nebr.	Neosho Frt. Grs. Assn.
17.			
18.			
19.			
20.			
21.			
22.	Neosho, Missouri	Milwaukee, Wis.	Neosho Frt. Grs. Assn.
23.			
4			
24.	Neosho, Missouri	Omaha, Nebr.	Neosho Frt. Grs. Assn.
25.	Neosho, Missouri	Chicago, Ill.	Southwest Mo. Frt. Grs. Assn.
26.			
27.			
28.			
29.			
30.			
31.	Anderson, Mo.	St. Joseph, Mo.	Anderson Frt. Grs. & Strawberry Association.
32.			
33.	Neosho, Mo.	Minneapolis, Minn.	Neosho Frt. Grs. Assn.
34.			

Count number.	Shipping points.	Destination	Shipper
35.	.....	.....	.....
36.	Anderson, Mo.....	Lincoln, Nebr.....	W. E. Roark.
37.	Neosho, Mo.....	Milwaukee, Wis.....	Neosho Frt. Grs. Assn.
38.	.....	.....	.....
39.	.....	.....	.....
40.	.....	.....	.....
41.	.....	.....	.....
42.	Tipton Ford, Mo...	Omaha, Nebr.....	Tipton Ford Frt. Grs. Assn.
43.	Anderson, Mo.....	Omaha, Nebr.....	W. E. Roark.
45.	.....	.....	.....
46.	Anderson, Mo.....	Burlington, Ia.....	Anderson Frt. Grs. & Strawberry Association.
47.	Decatur, Ark.....	St. Joseph, Mo.....	Anderson Frt. Grs. & Strawberry Association.
48.	.....	.....	.....
49.	Neosho, Mo.....	Milwaukee, Wis.....	Southwest Mo. Frt. Grs. Assn.
50.	.....	.....	.....
51.	.....	.....	.....
52.	.....	.....	.....
53.	.....	.....	.....
54.	.....	.....	.....
55.	.....	.....	.....
56.	.....	.....	.....
57.	.....	.....	.....
58.	.....	.....	.....
59.	.....	.....	.....
60.	.....	.....	.....
61.	.....	.....	.....
62.	.....	.....	.....
63.	.....	.....	.....
64.	Decatur, Ark.....	Omaha, Nebr.....	Ozark Frt. Grs. Association.
65.	.....	.....	.....
66.	.....	.....	.....
67.	Neosho, Mo.....	Omaha, Nebr.....	Neosho Frt. Grs. Association.
68.	.....	.....	.....
69.	.....	.....	.....
70.	.....	.....	.....
71.	.....	.....	.....
72.	.....	.....	.....
73.	.....	.....	.....
74.	Anderson, Mo.....	St. Joseph, Mo.....	Anderson Frt. Grs. & Berry Assn.
75.	Sulphur Sprgs., Ark	Omaha, Nebr.....	Sulphur Sprgs. Frt. Grs. Assn.
76.	Neosho, Mo.....	Lincoln, Nebr.....	Southwest Mo. Frt. Grs. Assn.
77.	.....	.....	.....
78.	.....	.....	.....
79.	Anderson, Mo.....	Kansas City, Mo.....	Anderson Frt. Grs. & Berry Assn.
80.	Neosho, Mo.....	Lincoln, Nebr.....	Southwest Mo. Frt. Grs. Assn.
81.	Anderson, Mo.....	St. Joseph, Mo.....	Anderson Frt. Grs. & Berry Assn.
82.	.....	.....	.....
83.	Anderson, Mo.....	Lincoln, Nebr.....	W. E. Roark.
84.	.....	.....	.....
85.	.....	.....	.....
35			
86.	.....	.....	.....
87.	Anderson, Mo.....	Kansas City, Mo.....	Anderson Frt. Grs. & Berry Assn.

Count number.	Shipping points.	Destination.	Shipper.
88.	Neosho, Mo.....	Sioux City, Ia.....	Southwest Mo. Frt. Grs. Assn.
89.	.....	.....	.....
90.	Goodman, Mo.....	Lincoln, Nebr.....	Goodman Frt. Grs. Association
91.	.....	.....	.....
92.	Neosho, Mo.....	Milwaukee, Wis.....	Southwest Mo. Frt. Grs. Assn.
93.	Anderson, Mo.....	Lincoln, Nebr.....	Anderson Frt. Grs. & Berry Assn.
94.	.....	.....	.....
95.	.....	.....	.....
96.	.....	.....	.....
97.	Anderson, Mo.....	St. Joseph, Mo.....	Anderson Frt. Grs. & Berry Assn.
98.	Neosho, Mo.....	Lincoln, Nebr.....	Southwest Mo. Frt. Grs. Assn.
99.	.....	.....	.....
100.	.....	.....	.....
101.	Anderson, Mo.....	Burlington, Ia.....	Anderson Frt. Grs. & Berry Assn.
102.	Neosho, Mo.....	Rockford, Ill.....	Southwest Mo. Frt. Grs. Assn.
103.	Neosho, Mo.....	Omaha, Nebr.....	Southwest Mo. Frt. Grs. Assn.
104.	.....	.....	.....
105.	.....	.....	.....
106.	Anderson, Mo.....	Lincoln, Nebr.....	Anderson Frt. Grs. & Berry Assn.
107.	Neosho, Mo.....	Omaha, Nebr.....	Neosho Frt. Grs. Association.
108.	.....	.....	.....
109.	Anderson, Mo.....	Omaha, Nebr.....	W. Ed. Roark.
110.	.....	.....	.....
111.	.....	.....	.....
112.	.....	.....	.....
113.	Neosho, Mo.....	Omaha, Nebr.....	Neosho Frt. Grs. Association.
114.	Anderson, Mo.....	St. Joseph, Mo.....	Anderson Frt. Grs. Association.
116.	Neosho, Mo.....	Omaha, Nebr.....	Neosho Frt. Grs. Association.
117.	.....	.....	.....
118.	Neosho, Mo.....	Omaha, Nebr.....	Neosho Frt. Grs. Association.
119.	.....	.....	.....
120.	.....	.....	.....
121.	.....	.....	.....
122.	Neosho, Mo.....	Minneapolis, Minn....	Southwest Mo. Frt. Grs. Assn.
123.	Neosho, Mo.....	Omaha, Nebr.....	Neosho Frt. Grs. Association.
124.	.....	.....	.....
125.	Siloam Sprgs., Ark.	Kansas City, Mo....	Siloam Sprgs. Frt. Grs. Assn.
126.	.....	.....	.....
127.	.....	.....	.....
128.	.....	.....	.....
129.	.....	.....	.....
130.	Anderson, Mo.....	Wichita, Kans.....	W. E. Roark.
131.	.....	.....	.....
132.	Anderson, Mo.....	Wichita, Kans.....	W. E. Roark
133.	.....	.....	.....
134.	.....	.....	.....
135.	.....	.....	.....
136.	.....	.....	.....
137.	.....	.....	.....
138.	.....	.....	.....
139.	.....	.....	.....
140.	Anderson, Mo.....	Wichita, Kans.....	W. E. Roark.
141.	Anderson, Mo.....	Wichita, Kans.....	W. E. Roark.
142.	.....	.....	.....

36

Count number.	Rate as contended for by plaintiff (per cwt.).	Freight charges as contended for by plaintiff.	Amount claimed to be due plaintiff.
1	94 cts.	$152.28	$15.20
2	.....	.....	.....
3	69 cts.	$105.57	$37.23
4	94 cts.	$143.82	$23.63
5	61 cts.	$98.82	$6.32
6	69 cts.	$110.54	$32.26
7	.....	.....	.....
8	94 cts.	$143.82	$23.63
9	.....	.....	.....
10	.....	.....	.....
11	.....	.....	.....
12	.....	.....	.....
13	94 cts.	$143.82	$19.38
14	.....	.....	.....
15	.....	.....	.....
16	81 cts.	$138.31	$9.52
16½	69 cts.	$105.57	$37.23
17	.....	.....	.....
18	.....	.....	.....
19	.....	.....	.....
20	.....	.....	.....
21	.....	.....	.....
22	94 cts.	$143.82	$23.63
23	.....	.....	.....
24	69 cts.	$105.57	$37.23
25	94 cts.	$162.43	$3.46
26	.....	.....	.....
27	.....	.....	.....
28	.....	.....	.....
29	.....	.....	.....
30	.....	.....	.....
31	61 cts.	$96.62	$8.52
32	.....	.....	.....
33	99 cts.	$151.47	$24.48
34	.....	.....	.....
35	.....	.....	.....
36	81 cts.	$131.22	$11.58
37	94 cts.	$153.69	$18.78
38	.....	.....	.....
39	.....	.....	.....
40	.....	.....	.....
41	.....	.....	.....
42	69 cts.	$104.74	$38.09
43	81 cts.	$130.73	$12.07
45	.....	.....	.....

37

46	87 cts.	$125.28	$17.55

Count number.	Rate as contended for by plaintiff (per cwt.).	Freight charges as contended for by plaintiff.	Amount claimed to be due plaintiff.
47	74 cts.	$119.88	$5.92
48	.....	.....	.....
49	94 cts.	$159.05	$8.43
50	.....	.....	.....
51	.....	.....	.....
52	.....	.....	.....
53	.....	.....	.....
54	.....	.....	.....
55	.....	.....	.....
56	.....	.....	.....
57	.....	.....	.....
58	.....	.....	.....
59	.....	.....	.....
60	.....	.....	.....
61	.....	.....	.....
62	.....	.....	.....
63	.....	.....	.....
64	94 cts.	$160.74	$3.42
65	.....	.....	.....
66	.....	.....	.....
67	69 cts.	$105.57	$37.23
68	.....	.....	.....
69	.....	.....	.....
70	.....	.....	.....
71	.....	.....	.....
72	.....	.....	.....
73	.....	.....	.....
74	61 cts.	$105.41	$1.73
75	90 cts.	$136.35	$26.85
76	69 cts.	$105.57	$37.23
77	.....	.....	.....
78	.....	.....	.....
79	55 cts.	$87.12	$18.02
80	69 cts.	$115.92	$27.91
81	61 cts.	$96.62	$8.52
82	.....	.....	.....
83	81 cts.	$116.64	$26.16
84	.....	.....	.....
85	.....	.....	.....
86	.....	.....	.....
87	55 cts.	$84.15	$20.99
88	89 cts.	$136.17	$27.03
89	.....	.....	.....
90	78 cts.	$131.98	$10.85
91	.....	.....	.....
92	94 cts.	$143.82	$23.66

Count number.	Rate as contended for by plaintiff (per cwt.).	Freight charges as contended for by plaintiff.	Amount claimed to be due plaintiff.
93	81 cts.	$128.30	$14.53
94	.....	.....	.....
95	.....	.....	.....
96	.....	.....	.....
97	61 cts.	$105.41	$1.43
98	69 cts.	$105.57	$37.23
99	.....	.....	.....
100	.....	.....	.....
101	87 cts.	$133.11	$9.72
102	94 cts.	$152.28	$10.95
103	79 cts.	$111.78	$31.02
104	.....	.....	.....
105	.....	.....	.....
106	81 cts.	$130.73	$12.10
107	69 cts.	$105.57	$37.23
108	.....	.....	.....
109	81 cts.	$125.15	$17.65
110	.....	.....	.....
111	.....	.....	.....
112	.....	.....	.....
113	69 cts.	$105.57	$37.23
114	61 cts.	$105.59	$1.45
116	69 cts.	$105.57	$37.23
117	.....	.....	.....
118	69 cts.	$111.78	$31.02
119	.....	.....	.....
120	.....	.....	.....
121	.....	.....	.....
122	99 cts.	$129.20	$46.21
123	69 cts.	$105.57	$37.23
124	.....	.....	.....
125	70 cts.	$81.48	$44.32
126	.....	.....	.....
127	.....	.....	.....
128	.....	.....	.....
129	.....	.....	.....
130	66 cts.	$104.54	$29.76
131	.....	.....	.....
132	66 cts.	$104.54	$29.76
133	.....	.....	.....
134	.....	.....	.....
135	.....	.....	.....
136	.....	.....	.....
137	.....	.....	.....
138	.....	.....	.....

Count number.	Rate as contended for by plaintiff (per cwt.).	Freight charges as contended for by plaintiff.	Amount claimed to be due plaintiff.
139.....	.....	.....	.....
140.....	66 cts.	$104.54	$29.76
141.....	66 cts.	$104.54	$29.76
142.....	.....	.....	.....

10. That the less-than-carload rates covering the shipments described in the items designated as Count- 1, 4, 22, 25, 37, 46, 49, 92, 101, 102, 122, of this stipulation and of the petition are carried in W. T. L. tariff 18B, I. C. C. A. 110, and that this tariff is subject to Item 319 A, Supplement 1, Trans-Missouri Rule Circular 1, I. C. C. 227, which was in effect the date the shipments were forwarded and an excerpt of this rule is set out below, under the caption "Rule 319." It is agreed that this is a correct copy of the rule and lawfully on file with the Interstate Commerce Commission, and the tariff in which it is found bears an Interstate Commerce Commission number, and can be used as evidence, the parties waiving the formality of a certified copy by the Secretary of the Interstate Commerce Commission.

Rule 319A.

"Where shippers cannot avail themselves of a regularly schedule refrigerator car service, refrigerator cars may be furnished for less-than-carload freight at the less-than-carload rates. The minimum charge for car so furnished will be the charge applicable on 10,000 pounds at the Second class rate from point of origin to point of final destination, but not less than $30.00. No charge will be made for initial icing or re-icing.

Exception—Will not apply on peddler cars. See Rule 292.

Will not apply on Nebraska Intra-State Traffic. See Rule 319."

11. That the less-than-carload rates covering the shipments described in the items designated as Counts 130, 132, 140, 141, of this stipulation and of the petition are carried in K. C. S. Tariff 320, I. C. C. 3037, and that this tariff is subject to Item 1015, Trans-Missouri Rule Circular 1 B, I. C. C. 261, and an excerpt of this rule is set out below, under the caption "Rule 1015." It is agreed that this is a correct copy of the rule and lawfully on file with the Interstate Commerce Commission, and the tariff in which it is found bears an Interstate Commerce Commission number, and can be used as evidence, the parties waiving the formality of a certified copy by the Secretary of the Interstate Commerce Commission.

40 *Rule* 1015.

"Icing, Refrigerator Car Service.

"Where shippers cannot avail themselves of a regularly scheduled refrigerator car service, refrigerator cars may be furnished for less-

than-carload freight at the less-than-carload rates. The minimum charge for cars so furnished will be the charge applicable on 100,00 pounds at the second class rate from point of origin to point of fina destination, but not less $30.00 per car. No charge will be mad for initial icing or for re-icing.

Exceptions—Will not apply on peddler cars. See Rule 960.

Will not apply on Nebraska Intrastate Traffic. See Rule 1020.

Will not apply via the St. J. & G. I. Ry., except when the revenu accruing to that line for cars so furnished is $30.00 or more pe car."

12. That the less-than-carload rates covering the shipments de scribed in the items, designated as Counts 5, 16, 31, 42, 80, 81, 90 93, 97, 106 and 114, of this stipulation and of the petition ar carried in K. C. S. tariff 235, I. C. C. 2715, and that this tariff i subject to item 319A, I. C. C. 2715, and that this tariff is subject to item 319A, Supplement 1, Trans-Missouri Rule Circular 1, I. C. C 227, which was in effect the date the shipments were forwarded, and an excerpt of this rule is set out in paragraph ten under the caption "Rule 319A." It is agreed that this is a correct copy of the rule and lawfully on file with the Interstate Commerce Commission and the tariff in which it is found bears an Interstate Commerce Commission number, and can be used as evidence, the parties waiving the formality of a certified copy by the Secretary of the Interstate Commerce Commission.

13. That the less-than-carload rates covering the shipments described in items designated as Counts 6, 13, and 75, of this stipulation and of the petition are carried in K. C. S. tariff 235 A, I. C. C. 3041, and that this tariff is subject to Rule 1015, Trans-Missouri Rules Circular 1B, I. C. C. 261, and an excerpt of this rule is set out in paragraph eleven, under the caption "Rule 1015." It is agreed that this is a correct copy of the rule and lawfully on file with the Interstate Commerce Commission, and the tariff in which it is found bears an Interstate Commerce Commission number, and can be used as evidence, the parties waiving the formality of a certified copy by the Secretary of the Interstate Commerce Commission.

14. That the less-than-carload rates covering the shipments described in the items designated as Counts 8 and 33 of this stipulation and of the petition are carried in W. T. L. 18 E. I. C. C. 237, and that this tariff is subject to Rule 1015, Trans-Missouri Rule Circular 1B, I. C. C. 261, which was in effect the date the shipments were forwarded and an excerpt of this rule is set out in paragraph 11, under the caption "Rule 1015." It is agreed that this is a correct copy of the rule and lawfully on file with the Interstate Commerce Commission, and the tariff in which it is found bears an Interstate Commerce Commission number, and can be used as evidence,
41 the parties waiving the formality of a certified copy by the Secretary of the Interstate Commerce Commission.

15. That the less-than-carload rates covering the shipments described in the items designated as Counts 79, 87 of this stipulation

and of the petition are carried in K. C. S. tariff 363, and that this tariff is subject to item 319A, Supplement 1, Trans-Missouri Rule Circular 1, I. C. C. 227, which was in effect the date the shipments were forwarded, and an excerpt of this rule is set out in paragraph 10 under the caption, "Rule 319A." It is agreed that this is a correct copy of the rule and lawfully on file with the Interstate Commerce Commission, and the tariff in which it is found bears an Interstate Commerce Commission number, and can be used as evidence, the parties waiving the formality of a certified copy by the Secretary of the Interstate Commerce Commission.

16. That the less-than-carload rates covering the shipments described in the items designated as Counts 74, 109, 64, 125 of this stipulation and of the petition are carried in K. C. S. tariff 363, and that this tariff is subject to Rule 1015, Trans-Missouri Rule Circular 1B, I. C. C. 261, which was in effect the date the shipments were forwarded, and an excerpt of this rule is set out in paragraph 11 under the caption, "Rule 1015." It is agreed that this is a correct copy of the rule and lawfully on file with the Interstate Commerce Commission, and the tariff in which it is found bears an Interstate Commerce Commission number, and can be used as evidence, the parties waiving the formality of a certified copy by the Secretary of the Interstate Commerce Commission.

17. That the less-than-carload rates covering the shipments described in the items designated as Counts 3, 161$_2$, 24, 36, 43, 67, 76, 83, 88, 98, 103, 107, 113, 116, 118, 123, 47 of this stipulation and of the petition are carried in K. C. S. tariff 235, I. C. C. 2715 and that this tariff is subject to Rule 1015, Trans-Missouri Rule Circular 1B, I. C. C. 261, which was in effect the date the shipments were forwarded and an excerpt of this rule is set out in paragraph 11, under the caption, "Rule 1015." It is agreed that this is a correct copy of the rule and lawfully on file with the Interstate Commerce Commission, and the tariff in which it is found bears an Interstate Commerce Commission number, and can be used as evidence, the parties waiving the formality of a certified copy by the secretary of the Interstate Commerce Commission.

Witness our hands and seals this 1st day of May, 1917.

CYRUS CRANE,
Attorney for Defendant, Kansas City Southern Railway Company.
E. H. HOGUELAND,
JOS. P. DUFFY,
Attorneys for Plaintiff.

Filed in the United States District Court May 1, 1917.

2 The Court: Have you anything, Mr. Lathrop?
Mr. Lathrop: No, we have not, that I know of.

At the close of the evidence the defendant offered a declaration f law in the nature of a demurrer to the evidence on each and

every one of the counts in plaintiff's petition upon which recovery was sought as follows:

(*Demurrer.*)

At the close of all the evidence the court declares the law to be that under the pleadings and the evidence the plaintiff is not entitled to recover upon the following counts of plaintiff's petition or upon any of them.

Counts 1, 3, 4, 5, 6, 8, 13, 16, 16½, 22, 24, 25, 31, 33, 36, 37, 42, 43, 46, 47, 49, 64, 67, 74, 75, 76, 79, 80, 81, 83, 87, 88, 90, 92, 93, 97, 98, 101, 102, 103, 106, 107, 109, 113, 114, 116, 118, 122, 123, 125, 130, 132, 140, 141.

Thereupon the court took said case under advisement and thereafter, upon the 22nd day of July, 1918, said court found the issues for the plaintiff and against the defendant and overruled and refused to give the aforesaid declaration of law asked by the defendant at the close of the evidence, to which action and ruling of the court in overruling and refusing to give said declaration of law, the defendant at the time duly excepted and still excepts.

Now, therefore, the court, being fully advised in the premises, doth find the foregoing to be a correct bill of exceptions, taken and saved on behalf of the defendant herein, and doth now sign the same, and doth order that the same may be filed and made a part of the record in this cause, which is accordingly done.

Given under the hand of the judge of said court before whom said proceedings were had, on this 1st day of March, 1919.

ARBA S. VAN VALKENBURGH,
Judge of the District Court of the United State for the Western Division of the Western District of Missouri.

We hereby consent that the foregoing is a full, true and correct bill of exceptions on behalf of the defendant herein, and agree that the same may be signed, filed and made a part of the record in this cause.

CHARLES M. BLACKMAR,
Attorney for Plaintiff.
CYRUS CRANE,
HUGH E. MARTIN,
JOHN H. LATHROP,
Attorneys for Defendant.

Filed in the United States District Court, March 1, 1919.

43 (*Order Extending Time to File Transcript in Court of Appeals.*)

(Order.)

For good cause shown and in accordance with stipulation of the parties, the time for filing the record in the above entitled cause with the clerk of the United States Circuit Court of Appeals for the Eighth Circuit is hereby enlarged so that said record may be filed on or before the 25th day of June, 1919.

ARBA S. VAN VALKENBURGH,
Judge.

Dated this 1st day of March, 1919.

Filed in the United States District Court, March 1, 1919.

(*Record Entry of Filing of Stipulation as to Transcript, Election as to Printing, and Præcipe for Transcript June 7, 1919.*)

This day comes the defendant by its attorneys and files stipulation as to transcript, election as to printing and præcipe for transcript.

(*Stipulation as to Transcript.*)

It is hereby stipulated by and between the parties that to save the expense of printing, it shall only be necessary to print in the transcript the first count of plaintiff's petition; and it is further stipulated that the allegations as to the shipments mentioned in the other counts, upon which judgment was rendered, are similar in form, and that the number of packages, date of origin, car reference, consignee, freight charges as collected and actual weight, shipping points, destination, shipper, rates as contended for by plaintiff, freight charges as contended for by plaintiff, amount claimed to be due plaintiff, are, as to all of said other counts, shown in the stipulation covering said matters, offered in evidence and contained in the bill of exceptions.

It is further stipulated that in order to save expense of printing the dates given in said stipulation as the dates of origin on the various shipments shall be taken as the dates when the freight charges were actually paid by the various shippers, and that the date of filing the petition herein was May 12, 1915, and that no complaint involving the claims sued for herein was made to or filed with the Interstate Commerce Commission.

CYRUS CRANE,
HUGH E. MARTIN,
JOHN H. LATHROP,
Attorneys for Plaintiff in Error.
HENRY A. BUNDSCHU,
CHARLES M. BLACKMAR,
Attorneys for Defendant in Error.

Filed in the United States District Court, June 7, 1919.

44 (*Election as to Printing.*)

To the Honorable Edwin R. Durham, Clerk of United States District Court:

Now comes the Kansas City Southern Railway Company, defendant, and plaintiff in error, in the above entitled cause, and states that it elects to have the transcript of the record of the proceedings in this court printed and compiled under your supervision and thereafter filed in the United States Circuit Court of Appeals for the Eighth Circuit.

CYRUS CRANE,
HUGH E. MARTIN,
JOHN H. LATHROP,
Attorneys for the Kansas City Southern Railway Company.

Filed in the United States District Court, June 7, 1919.

(*Præcipe for Transcript.*)

The following portions of the transcript herein are deemed necessary by the plaintiff in error for the full understanding and determination of said cause, upon the error therein assigned, and the clerk is requested to cause the same to be printed in the manner as provided by the rules of this court, including therein the following portions, and no other, to-wit:

1. Count 1 of plaintiff's petition and filing mark on petition.
2. Stipulation as to remaining counts of plaintiff's petition.
3. Demurrer of defendant.
4. Ruling of court on demurrer.
5. Answer of defendant.
6. Stipulation waiving jury and order based thereon.
7. Bill of exceptions.
8. Judgment.
9. Opinion of the court.
10. Defendant's motion for new trial.
11. The court's order on motion for new trial.
12. Petition for writ of error.
13. Assignment of errors.
14. Order allowing writ of error with return of clerk.
15. Bond of writ of error.

16. Citation.

17. Order allowing time to file bill of exceptions.

18. Præcipe for transcript of the record.

19. Order extending time to file transcript.

20. Election as to printing.

CYRUS CRANE,
HUGH E. MARTIN,
JOHN H. LATHROP,
Attorneys for Plaintiff in Error.

45 Copy of the above præcipe received and we hereby join with plaintiff in error in designating the above parts of the record as those necessary for the consideration of the errors assigned.

CHARLES M. BLACKMAR,
HENRY A. BUNDSCHU,
Attorneys for Defendant in Error.

Filed in the United States District Court, June 7, 1919.

(*Memorandum on Final Hearing.*)

The court is of opinion, upon an examination of the petition, record and brief of counsel for plaintiff, and upon the arguments of counsel presented at the hearing, that plaintiff is entitled to recover upon his petition in accordance with the agreed statement of facts presented. No brief was filed by counsel for defendant, and from the action of defendant in similar cases, and the statements of its officers and representatives, all bearing upon the interpretation of the rule in question, it is not believed that the underlying right of the plaintiff to recover is seriously contested. However, upon the entire record, the court is of opinion that plaintiff is entitled to recover.

It appears that a good deal of labor was necessary in the preparation of the pleadings and evidence in this case, and that this labor was necessarily increased by the contention of defendant, which the court finds to be without merit. The statute provides for the allowance of a reasonable attorney's fee. Under all the circumstances of the case and the testimony adduced therein, I believe a fee of $300 is reasonable. The same is, therefore, allowed and directed to be taxed as costs. It is so ordered.

Kansas City, Missouri, July 20th, 1918.

ARBA S. VAN VALKENBURGH,
Judge.

Filed in the United States District Court July 22, 1918.

46 UNITED STATES OF AMERICA, *set:*

I, Edwin R. Durham, clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, bill of exceptions, assignment of errors, and all proceedings in the cause, wherein Harry B. Wolf is plaintiff and Kansas City Southern Railway Company is defendant, No. 4367, as fully as the same appears on file and of record in my office, in compliance with præcipe filed herein and made a part hereof.

I further certify that the original citation and writ of error are prefixed hereto and returned herewith.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 14th day of June, A. D. 1919.

[SEAL.] EDWIN R. DURHAM,
Clerk U. S. District Court.

U. S. District Court, Western Division of Western District of Missouri.

47 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Plaintiff in Error.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5432.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

HARRY B. WOLF.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

CYRUS CRANE,
HUGH E. MARTIN,
JOHN H. LATHROP,
304 First National Bank Bldg., Kansas City, Mo.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 19, 1919.

(*Appearance of Counsel for Defendant in Error.*)

The Clerk will enter my appearance as Counsel for the Defendant in Error.

CHARLES M. BLACKMAR,
HENRY A. BUNDSCHU,
Commerce Bldg., Kansas City, Mo.

48 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 7, 1919.

(Order of Argument.)

December Term, 1919.

Tuesday, December 16, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. John H. Lathrop for plaintiff in error and the hour for adjournment having arrived further argument was postponed until to morrow.

(Order of Submission.)

December Term, 1919.

Wednesday, December 17, 1919.

This cause having been called for further hearing, argument was resumed by Mr. John H. Lathrop for plaintiff in error, continued by Mr. Charles M. Blackmar for defendant in error and concluded by Mr. John H. Lathrop for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

49 *(Opinion.)*

United States Circuit Court of Appeals, Eighth Circuit. December Term, A. D. 1920.

No. 5432.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

HARRY B. WOLF, Defendant in Error.

In Error to the District Court of the United States for the Western District of Missouri.

Mr. John H. Lathrop (Mr. Cyrus Crane, Mr. Hugh E. Martin and Mr. James M. Souby were with him on the brief), for plaintiff in error.

Mr. Charles M. Blackmar (Mr. Joseph P. Duffy and Mr. Henry A. Bundschu were with him on the brief), for defendant in error.

Before Hook and Stone, Circuit Judges, and Lewis, District Judge.

HOOK, *Circuit Judge*, delivered the opinion of the Court.

This was an action by Wolf, assignee of a number of shippers, to recover freight overcharges. The published tariffs of the Railway Company specified two rates for shipments of strawberries in carload lots, the higher rate carrying an additional charge for icing and the lower not. The applicability of the one or the other depended upon a condition of fact recited in published rules of the company. It was shown at the trial that the condition entitling the shippers to the lower rate without charge for icing existed, but the higher rate was charged and collected. The controlling ques-
50 tion in the case is whether the claims for repayment of the overcharges might be the subject of an original action in court, or on the other hand, should first have been submitted to the Interstate Commerce Commission (Interstate Commerce Act Secs. 9, 16 and 22, 24 Stat. 379; 34 Stat. 584; 41 Stat. 491). The former procedure was adopted in this case. If the latter should have been followed the claims were barred by the limitation provided in Sec. 16.

We think it quite plain that there was nothing about the tariffs, rules, or claims for overcharge calling for any administrative action of the Commission as a prerequisite to an action in court. There was no attack upon the tariffs or the rules. The lower rate expressly applied in the absence of a particular transportation service within the control of the Railway Company, and it was shown that the service was not furnished. The conclusion that it was proper to bring an original action in court is supported by National Elevator Co. v. Railway, 158 C. C. A. 558, 246 Fed. 588, decided by this court. See also Pennsylvania R. Co. v. Puritan Coal Co., 237 U. S. 121; Illinois Central R. Co. v. Mulberry Coal Co., 238 U. S. 275; Pennsylvania R. Co. v. Somman Coal Co., 242 U. S. 120.

The judgment is Affirmed.

Filed April 5, 1921.

51 *(Judgment.)*

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1920.

Tuesday, April 5, 1921.

No. 5432.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

HARRY B. WOLF.

In Error to the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Harry B. Wolf have and recover against The Kansas City Southern Railway Company the sum of twenty dollars for his costs herein and have execution therefor.

April 5, 1921

52 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 5432.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

HARRY B. WOLF, Defendant in Error.

Petition for Rehearing.

Comes now the plaintiff in error and moves the court to grant a rehearing in this cause, and respectfully states, without argument, the ground therefore.

I.

Unless there was an applicable ruling by the Interstate Commerce Commission, the court below was without jurisdiction to hear and determine the issues for the reason that the matter involved called for the interpretation of a tariff rule or regulation of plaintiff in error which was on file with the Interstate Commerce Commission, which tariff rule or regulation should, under the Act to Regulate

Commerce as amended and under the decisions of the United States Supreme Court, have been first submitted to and interpreted by the Interstate Commerce Commission.

The Interstate Commerce Commission has primary and exclusive jurisdiction in the interpretation of such rules and regulations. T. & P. v. American Tie and Timber Co., 234 U. S. 138, 34 Sup. Ct. Rep. 885; Director General v. Viscose Co., Advance Opinions
53 of the Supreme Court, No. 6, page 170; Loomis v. Lehigh Valley R. Co., 240 U. S. 43, 36 Sup. Ct. Rep. 228.

The rule in question required the exercise of the administrative power of the Commission.

The interpretation of the rule required a knowledge of practical railroad operation and practices. It was therefore not so clear as to make unnecessary the opinion of a highly specialized body such as the Interstate Commerce Commission. That is shown by the following:

1. The difference of opinion between shippers and carriers as evidenced by the record in this case. There was not only a dispute between shippers over the line of The Kansas City Southern Railway Company and the railroad, but there was also a controversy between shippers over the line of the Frisco and that company, as evidenced by the report of the Interstate Commerce Commission in the case of R. W. Gees Commission Co. v. St. L. & S. F. Ry. Co., Unreported Opinion, A-992.

2. The fact that the attorneys for defendant in error, who were also attorneys for complainant in the case of Gees Commission Co. v. Frisco, supra, decided by the Commission February 18, 1915, thought it necessary to present this same rule to the Commission for interpretation in that case, and only brounght this suit after the Gees case was decided.

3. The fact that Judge Sanborn of this Circuit wrote an opinion in the case of North American Co. v. St. L. & S. F. Ry. Co. on the claim of Harry B. Wolf, Intervenor, (see brief of plaintiff in error, Appendix) in which he dealt with a claim based on the same rule here in question. In that opinion, he quotes the rule. He then says:

Two classes of action for damages arise out of the conduct of transportation in interstate commerce, those which may not be maintained until after a decision by the Interstate Commerce Commission of some issue material to a recovery by the complainants * * * (citing cases) and those in which an action may be maintained without the previous decision by the Interstate Commerce Commission of any question material to a recovery * * * (citing cases). * * *

54 The doubtful question, in this case, is whether they (the shipments) fell under the car load or less than car load rates and rules. * * * On the question here at issue the conclusion is that the claim of the intervenor falls in the first class of cases speci-

fied in this opinion and that it cannot be lawfully allowed by this court in the absence of a previous conclusive determination of the rate issues involved in it by the Interstate Commerce Commission.

4. The Interstate Commerce Commission in Refrigeration Charges on the Kansas City Southern Railway, 26 I. C. C. 617, had this rule under consideration. On page 621 of the opinion, it is said, with reference to that rule:

We make this observation in the full understanding that the rule is not restricted to any particular traffic under its terms, although it is perhaps susceptible to doubtful construction in certain other respects.

The Commission, therefore, in that sentence has stated that the rule here under consideration was by no means clear, and the Commission there expressed a doubt as to its meaning or as to the construction which might be placed upon it.

II.

There was no evidence offered by defendant in error to show that the shipments involved were less-than-carload shipments, and without such a showing defendant in error made no case, as the burden was on him to show in any event that the shipments came under the rule contended for, which admittedly applied only to less-than-carload shipments. This was fatal regardless of the other points in the case.

III.

Defendant in error based his case upon the opinion of the Interstate Commerce Commission in the case of R. W. Gees Commission Co. v. Frisco, decided by the Commission February 18, 1915, Unreported Opinion A-992.

In his petition (paragraph 5 thereof) he relied on the interpretation that the Interstate Commerce Commission placed upon
55 the rule in the Gees case as entitling him to recover in the instant proceeding. He thereby brought himself under the rule announced by the Supreme Court in the case of Phillips Co. v. Grand Trunk Ry., 236 U. S. 662-666, 35 Sup. Ct. Rep. 444, which holds that claims, based on a decision of the Interstate Commerce Commission, are barred by the two year statute of limitation contained in the Act to Regulate Commerce.

The Phillips case holds that unless suit is filed before the Interstate Commerce Commission or the courts within two years, such claims are extinguished. See also U. S. v. I. C. C., 246 U. S. 638.

IV.

All claims of which the Interstate Commerce Commission has jurisdiction are barred by the two year statute of limitations prescribed by the Interstate Commerce Act. This necessarily follows

from the principles on which the decision in the Phillips case, supra, is based.

The Act to Regulate Commerce had as one of its primary purposes, the doing away with discrimination. In the Phillips case, it is said (35 Sup. Ct. Rep. 446):

Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227-232, 31 L. Ed. 128-130, 8 Sup. Ct. Rep. 82), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the Commerce Act.

The intention of Congress could not have been to prescribe or allow the act to prescribe one period of limitations for shippers who file their claims before the Interstate Commerce Commission and various other periods of limitations for shippers who file suits on claims before the courts. The Federal courts adopt the statute of limitations of states in which their districts are located, unless a Federal statute provides a limitation period covering the particular matter in
56 controversy. There is no particular Federal statute covering claims of this kind unless the two year limitation in the Commerce Act supplies. The statutes of the states have varying periods of limitations covering these claims. If the courts decide that the two year period does not cover all claims for reparation, whether brought before the courts or the Commission, the door is open wide to all sorts of discrimination. A shipper who lives in a state with a three year statute of limitations would be at a disadvantage as compared to shippers who live in states which have statutes allowing suits to be brought within periods longer than three years.

The decision of this court would allow a person who had filed a claim with the Commission on only a part of his shipments to still file suit on the balance of his claims before the courts, even after the two year period for filing them with the Commission had expired, or carrying the proposition still further, if a shipper on the same day shipped two carloads of a certain commodity from the same point to the same destination and filed a claim for reparation with the Commission on one car within two years after the charges had been paid, he could still, after the two year period, file suit in the district court on the other car. The suggestion that Congress intended to permit such a state of affairs to exist seems idle after its statement.

The Transportation Act, 1920, which amended and added to the Act to Regulate Commerce, contained a provision requiring all suits brought by carriers to recover undercharges to be brought within three years. (Section 16, paragraph 3, Interstate Commerce Act as amended.) Under that Section, the three year period applies as well to suits for undercharges brought in the State or Federal courts and it makes no difference in what State or Federal court the suit is brought. Likewise, Congress did not intend that there should be varying statutes of limitations applying to shippers' claims. In the Phillips case, supra, it is said:

To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of
57 the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier.

In Loomis v. Lehigh Valley R. Co., 240 U. S. 43, 36 Sup. Ct. Rep. 228, it is said:

An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by carrier's published tariffs * * * And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court.

In the case of T. & P. R. Co. v. Abilene Cotton Co., 204 U. S. 426, 27 Sup. Ct. Rep. 350, the court considered at length the purposes of the Act to Regulate Commerce. In that case, plaintiff had brought a suit in the Texas State Court to recover for the exaction of an alleged unreasonable rate. The court held that such matters should be first submitted to the Commission for determination. In that case it was urged by defendant in error (plaintiff below) that in view of Section 22 of the Act, which provides that the common law rights of shippers should not be abridged or altered by the Act, it still had the right to maintain its suit in the State Court. With reference to that contention, the court said:

This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.

58 In the case of B. & O. R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 30 Sup. Ct. Rep. 164, which involved car distribution rules and regulations of the B. & O. R. Co., the court held that the Interstate Commerce Commission had primary and exclusive jurisdiction over such rules. It reasons as follows:

A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found, the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it,

that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure.

In Robinson v. B. & O. R. Co., 222 U. S. 506, 32 Sup. Ct. Rep. 114, the court had under consideration a rule which provided for a rate of fifty cents more per ton when coal was loaded into cars from wagons than when the loading was done from a tipple. The question in the case was whether or not plaintiff should have submitted the rule to the Commission for interpretation; that is, whether the Commission should have first determined whether or not the rule unjustly discriminated against the plaintiff. The court held that the matter should have been first submitted to the Commission, and quoted at length from the case of T. & P. R. Co. v. Abilene Cotton Oil Co., supra. The court said that it was obvious that to permit the courts to determine whether this rule was discriminatory or not, and also permit the Commission to determine that question, "would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another; would destroy the prohibitions against preferences and discrimination and afford moreover a ready means by which through collusive proceedings, wrongs which the statute was intended to remedy, could be successfully inflicted." All of the evils described by the court in the above quotation would be permitted under this court's decision in this case.

59 It appears from the above quotations that the Supreme Court, having in mind the fundamental purposes of the act, adhered more to a broad and constructive interpretation of the Interstate Commerce Act than to a narrow and destructive one, and that is what we are contending for here.

This record contains an example which illustrates our point adequately and completely. Count 79 of the petition in this case was based on a shipment which originated at Anderson, Missouri, and was destined to Kansas City, Missouri. This shipment was made by the Anderson Fruit Growers and Berry Association to R. W. Gees Commission Company. The date of shipment of the car was May 19, 1910 (Abs. 29, 32, 34).

In the case of Gees Commission Co. v. Frisco, Unreported Opinion A-992, decided by the Commission February 18, 1915 (shown in Appendix, brief of plaintiff in error), a shipment originated at Springdale, Ark., destined to Kansas City. The date of shipment was May 14, 1912, two years after the movement involved in this case. The complaint in Gees Commission Co. v. Frisco was filed August 18, 1913.

At the date when the complaint in the Gees case was filed before the Commission, over three years after the movement covered by Count 79, the claim for reparation involved in Count 79 was barred or extinguished. We, therefore, have in this record an example which illustrates the lack of uniformity which the decision of this court permits, and which the Supreme Court in the Phillips case, supra, said the Act to Regulate Commerce was intended to prevent.

It is interesting to note that this suit was not filed until May 12, 1915, about three months after the decision was handed down by

the Commission in the Gees case; also that the same attorney represented the plaintiff in both cases. It is quite apparent that this suit only awaited the outcome of the Gees case, or that after the decision in the Gees case the attorney in that case gathered up all of the claims he could find, whether barred by the two year period of limitation or not, and attempted to secure a preference for the shippers who had given him assignments by means of this suit in the Federal court. By his actions and with the permission of
60 this court, he has completely circumvented the outstanding purpose of the Commerce Act, which was intended to prevent preference and discrimination, and preserve uniformity.

Being debarred from the Interstate Commerce Commission by the two year statute, plaintiff seeks to evade its provisions by bringing suit in court. But "the lapse of time not only bars the remedy but destroys the liability, whether the complaint is filed with the Commission or suit is brought in a court of competent jurisdiction." Phillips case, supra.

Respectfully submitted,

FRANK H. MOORE,
CYRUS CRANE,
JOHN H. LATHROP,
GEORGE H. MUCKLEY,
Attorneys for Plaintiff in Error.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioners should be granted by this court.

FRANK H. MOORE,
Attorney for Petitioner.

(Endorsed:) Filed in U. S. Circuit Court of Appeals. May 27, 1921.

61 *(Order Denying Petition for Rehearing.)*

May Term, 1921.

Saturday, July 2, 1921.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

July 2, 1921.

(Petition for Writ of Error from Supreme Court U. S. and Allowance Thereof.)

The Kansas City Southern Railway Company respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a final judg-

ment has therein been rendered on the 5th day of April, 1921, affirming the judgment of the District Court of the United States for the Western District of Missouri in favor of the said Harry B. Wolf and against The Kansas City Southern Railway Company in the sum of $1,723.93, together with interest and costs, including an attorneys' fee of $300.00; that on the 27th day of May, 1921, the plaintiff in error filed herein its motion for rehearing, which was by the said Circuit Court of Appeals overruled on the 7th day of July, 1921; that this cause is one which arises under the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory
62 thereof and supplementary thereto; that the matter in controversy exceeds one thousand dollars, besides costs; that it is a cause in which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction and is a proper case to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore, the said plaintiff in error prays that a writ of error be issued in its behalf directing that the transcript of the record and proceedings and papers in said cause duly authenticated may be sent to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herein filed by the said plaintiff in error may be reviewed, and that if error be found, the same may be corrected according to the laws and customs of the United States.

FRANK H. MOORE,
A. F. SMITH,
CYRUS CRAME,
G. H. MUCKLEY,
Attorneys for Plaintiff in Error.

Writ of error allowed, and bond in the sum of $3,500.00 is hereby approved to operate as a supersedeas this 10 day of September, A. D., 1921.

KIMBROUGH STONE,
Judge United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1921.

63 (*Assignment of Errors on Writ of Error from Supreme Court U. S.*)

Now comes the above named plaintiff in error (which was defendant below, and is herein referred to as defendant), The Kansas City Southern Railway Company, by its attorneys, and says that in the record and proceedings in the above entitled cause there is manifest error in this to wit:

I.

The Circuit Court of Appeals erred in that the causes of action, if any, in each and every one of the counts in plaintiff's petition are and were barred by the statute of limitations applicable in such cases.

II.

The Circuit Court of Appeals erred in failing to hold that each of said causes of action presented a question exclusively within the primary jurisdiction of the Interstate Commerce Commission and was therefore barred and extinguished because not filed or sued on within two years after accrual, as provided in the Act to Regulate Commerce, approved February 1, 1887, and acts amendatory and supplemental thereto, and especially Section 16 thereof.

III.

The Circuit Court of Appeals erred in failing to hold that whether the Interstate Commerce Commission had such exclusive primary jurisdiction or not, each of said causes of action was barred and extinguished under the provisions of the said Act to Regulate Commerce, whether filed or sued on before the Interstate Commerce Commission or in Court.

64 IV.

The Circuit Court of Appeals erred in not holding that this action was based upon a prior order or finding of the Interstate Commerce Commission interpreting and construing the tariff rule here involved, and that, consequently, claims of plaintiff as set out in his petition were barred and extinguished by the statute of limitations with reference to such claims as provided in the Act to Regulate Commerce and acts amendatory thereof and supplementary thereto.

V.

The Circuit Court of Appeals erred in sustaining the action of the District Court in overruling the demurrer of the defendant at the close of all the evidence in words and figures as follows to wit:

At the close of all the evidence, the Court declares the law to be that under the pleadings and the evidence the plaintiff is not entitled to recover upon the following counts of plaintiff's petition; or upon any of them:

Counts 1, 3, 5, 6, 8, 13, 16, 16½, 22, 24, 25, 31, 33, 36, 37, 42, 43, 46, 47, 49, 64, 67, 74, 75, 76, 79, 80, 81, 83, 87, 88, 90, 92, 93, 97, 98, 101, 102, 103, 106, 107, 109, 113, 114, 116, 118, 122, 125, 130, 132, 140, 141.

VI.

The Circuit Court of Appeals erred in affirming the judgment of the District Court in this cause on each count of the petition above referred to in favor of the plaintiff and against the defendant.

VII.

The Circuit Court of Appeals erred in not holding that the plaintiff had not met the burden of proof upon him, on account of his
65 failure to show that the shipments involved in this case were less than carload shipments, to which class of shipments only, the rule in controversy was applicable.

VIII.

The Circuit Court of Appeals erred in affirming the judgment of the District Court in favor of the plaintiff because upon the entire record and evidence and under the law, judgment should have been entered herein for the defendant.

IX.

The Circuit Court of Appeals erred in affirming the judgment of the District Court in allowing an attorneys' fee of $300.00, or any other amount.

Wherefore, plaintiff in error prays that the judgment herein be reversed and rendered in its favor, or that the judgment be reversed and such direction be given as will insure to plaintiff in error the full force and efficacy of the rights to which it is entitled by reason of the facts in this case, the law applicable thereto, and the defenses they have urged.

FRANK H. MOORE,
A. F. SMITH,
CYRUS CRANE,
G. H. MUCKLEY,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1921.

(*Supersedeas Bond on Writ of Error from Supreme Court U. S.*)

Know all men by these presents, that we, The Kansas City
66 Southern Railway Company, a corporation organized and existing under the laws of the State of Missouri, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the above named Harry B. Wolf in the sum of Thirty Five Hundred ($3,500.00) Dollars, to be paid to the said Harry B. Wolf, his executors, administrators or assigns, for the pay-

ment of which well and truly to be made we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of August, 1921.

Whereas the above named, The Kansas City Southern Railway Company, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the United States Circuit Court of Appeals, Eighth Circuit;

Now, therefore, the condition of this obligation is such that if the said The Kansas City Southern Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY.
By A. M. CALHOUN,
Its Asst. V. Pres.

[SEAL.] AMERICAN SURETY CO. OF NEW YORK,
By GEO. E. EGGER,
Res. Vice Prest.

Attest:
O. L. KINCHELOE,
Res. Asst. Secy.

67 The above and foregoing bond is hereby approved to operate as a supersedeas this 10th day of September, 1921.
KIMBROUGH STONE,
Judge United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1921.

68 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you or some of you, between The Kansas City Southern Railway Company, plaintiff in error, defendant below, and Harry B. Wolf, defendant in error, plaintiff below, a manifest error hath happened to the great damage of the said plaintiff in error, The Kansas City Southern Railway Company, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then,

under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty (30) days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court, the 10th day of September, in the year of our Lord, One Thousand, Nine Hundred and Twenty One.

Issued at office in the City of St. Louis, Missouri, with the seal of the United States Circuit Court of Appeals, and dated as aforesaid.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Allowed by
KIMBROUGH STONE,
United States Circuit Judge in and for the Eighth Circuit.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourth day of October, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

68½ [Endorsed:] #5432. The Kansas City Southern Railway Company, Plaintiff in error, v. Harry B. Wolf, Defendant in error. Writ of error from Supreme Court, U. S., and clerk's return. Filed Sep. 12, 1921. E. E. Koch, Clerk.

69 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

To Harry B. Wolf and Charles M. Blackmar and Henry A. Bundschu, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein The Kansas City Southern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kimbrough Stone, one of the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, this 10 day of September, in the year of our Lord, One Thousand, Nine Hundred and Twenty One.

KIMBROUGH STONE,
United States Circuit Judge,
in and for the Eighth Circuit.

Due service of the foregoing citation hereby acknowledged and further notice waived this 14th day of September, in the year of our Lord, One Thousand, Nine Hundred and Twenty One.

CHARLES M. BLACKMAR,
HENRY A. BUNDSCHU,
Attorneys for Defendant in Error.

69½ [Endorsed:] #5432. The Kansas City Southern Railway Company, Plaintiff in error, v. Harry B. Wolf, Defendant in error. Citation on Writ of Error from Supreme Court U. S. and acknowledgment of service. Filed Sep. 16, 1921. E. E. Koch, Clerk.

70 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Missouri as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of all

the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein The Kansas City Southern Railway Company was Plaintiff in Error, and Harry B. Wolf was Defendant in Error, No. 5432, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original writ of error with the Clerk's return endorsed thereon and the original citation with acknowledgment of service endorsed thereon, are hereto attached and herewith returned.

I do further certify that on the twenty-second day of July, A. D. 1921, a mandate was issued out of said Circuit Court of Appeals in this cause, directed to the Judges of the District Court of the United States for the Western District of Missouri.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourth day of October, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 28,538. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 583. The Kansas City Southern Railway Company, plaintiff in error, vs. Harry B. Wolf, Charles M. Blackmar, and Henry A. Bundschie. Filed October 14th, 1921. File No. 28,538.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1922.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error*,

vs.

HARRY B. WOLF, CHARLES M. BLACKMAR, HENRY A. BUNDSCHU, *Defendants in Error*.

No. 194

In Error to the United States Circuit Court of Appeals, Eighth Circuit.

Brief for Plaintiff in Error.

FRANK H. MOORE,
CYRUS CRANE,
GEORGE H. MUCKLEY,
Attorneys for Plaintiff in Error.

SAMUEL W. MOORE, of Counsel.

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FRANK H. MOORE,
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vs.

HARRY B. WOLF, CHARLES M. BLACKMAR, HENRY A. BUNDSCHU, *Defendants in Error*.

No. 194

In Error to the United States Circuit Court of Appeals, Eighth Circuit.

Brief for Plaintiff in Error.

STATEMENT.

The main question involved in this case is the question whether the two-year statute of limitations contained in Section 16 of the Interstate Commerce Act (34 Stat. at L. 590) which provides that "all complaints for the recovery of damages shall be filed with the Commission within two years after the time the cause of action accrues, and not after" applies to the claims sued on in

this proceeding, and bars a recovery. *Phillips Company v. Grand Trunk Western R. Co.*, 236 U. S. 662.

This is an action to recover certain alleged overcharges on a large number of interstate shipments of strawberries originating at points in Missouri and Kansas and destined to points beyond Kansas City, Missouri. The shipments were made between the dates, May 9, 1910, and May 30, 1912, and this suit was filed May 12, 1915. Harry B. Wolf, one of the defendants in error, is the assignee of the various shippers mentioned in the counts sued upon, and Charles M. Blackmar and Henry A. Bundschu, the other defendants in error, are his attorneys. The Kansas City Southern Railway Company will be referred to as the defendant, and Harry B. Wolf will be referred to as the plaintiff, since they occupied those positions in the United States District Court.

The defendant charged the carload rate upon each of these shipments of strawberries, and the plaintiff claims that a less-than-carload rate should have been applied (Rec. 4.)

The defendant railroad had in its tariffs, at the time when these shipments moved, the following rules:

Rule 319A, reading as follows:

> Where shippers cannot avail themselves of a regularly scheduled refrigerator car service, refrigerator cars may be furnished for less-than-carload freight at the less-than-carload rates. The minimum charge for car so furnished will be the charge applicable on 10,000 pounds at the second class rate from point of origin to point of final destination, but not less than $30.00. No charge will be made for initial icing or re-icing.

and Rule 1015, which was substantially the same. Both rules are set out in the record (Rec. 43-44.)

The St. Louis & San Francisco Railroad Company had in its tariffs a similar rule. A complaint was

brought by the *R. W. Gees Commission Co. v. St. Louis & San Francisco Railroad Co., et al.*, before the Interstate Commerce Commission, and on February 18, 1915, the Commission decided, in Unreported Opinion No. A-992, that the less-than-carload, and not the carload, rate, applied on the shipment involved in the Gees case, and awarded reparation for the amount of the difference between the carload freight charges, and the less-than-carload freight charges, the amount of the charges being less under the less-than-carload rate. This decision is printed as Appendix A to this brief.

The rule in the Frisco tariffs is quoted in the Commission's opinion in the Gees case as follows:

> Less-than-carload shipments of freight requiring refrigerator cars will be transported in refrigerator cars when regularly scheduled refrigerator car service is available from point of shipment to destination, at less-than-carload ratings and rates provided for in classifications and tariffs lawfully on file with the Interstate Commerce Commission.
>
> When a shipper cannot avail himself of the regularly scheduled refrigerator car service, refrigerator cars will be furnished, provided the shipper is willing to pay charges on weight of not less than 10,000 pounds, at the less-than-carload rates.

The plaintiff did not file any complaint, on account of the shipments involved in this suit, with the Interstate Commerce Commission (Rec. 47,) but, after the decision, by the Commission, in the Gees case, the plaintiff, on May 12, 1915, filed this suit in the United States District Court for the Western Division of the Western District of Missouri.

Among other things, plaintiff alleged (Rec. 3-5) in his petition:

> That pursuant to an act passed by the Congress of the United States, entitled "An Act to regulate

commerce," approved February 4th, 1887, and acts amendatory and supplementary thereto, and pursuant further to a ruling and order made and entered by the Interstate Commerce Commission on the 18th day of February, 1915, said Interstate Commerce Commission made and entered its order, defining, determining and construing the lawful and prevailing rate and weight governing and controlling said shipment, to-wit: the actual weight based upon the published tariff rate on "less than carload" shipments and to which defendant carrier was by law entitled and plaintiff alleges that the amount so paid defendant by said owner was paid without said owner's acquiescence and was unlawful and unjust.

That such true and lawful tariff rate has at all times been duly and regularly published and filed with the Interstate Commerce Commission.

The defendant filed a demurrer to the said petition "because each of said counts shows upon its face that the pretended claim which is made the basis of such count accrued more than two years prior to the institution of this action, and by reason thereof plaintiff is not entitled to recover upon such count." Defendant also demurred because each of the said counts failed to state facts sufficient to constitute a cause of action, or to entitle plaintiff to any relief (Rec. 5.) Defendants' demurrer was overruled, and exception saved (Rec. 6,) and defendant filed a general denial, and also pleaded that each count was barred by the statute of limitations contained in the Act to Regulate Commerce (Rec. 6.) At the close of all the evidence, defendant filed a demurrer, which was overruled and exception saved (Rec. 46.)

Many of the facts of the case are covered by stipulation (Rec. 29-45.) Defendant charged the correct rate for carload shipments. It is agreed in the stipulation (Rec. 30):

7. That the rates on which charges were collected were published, together with the minimum weights, according to law, and are on file with the Interstate Commerce Commission, and are legal rates and legal minimum weights, whenever applicable.

It is stipulated by the parties (Rec. 47) that "the dates given in said stipulation as the dates of origin on the various shipments shall be taken as the dates when the freight charges were actually paid by the various shippers, and that the date of filing the petition herein was May 12, 1915."

The stipulation referred to in the above quotation appears in the record at pages 29 to 45 and shows that the date of the first shipment was May 9, 1910 (Rec. 33,) and of the last shipment, May 30, 1912 (Rec. 31,) so that, in all cases, more than two years had elapsed after the accrual of the cause of action before suit was brought, and all the counts in the said petition are barred if the two year statute of limitations contained in Section 16 of the Interstate Commerce Act applies.

The petition contains some 88 counts which are still involved in the case (some counts of the petition having been withdrawn,) each count involving a separate and distinct car or shipment. Judgment was rendered for plaintiff, in the District Court for the Western Division of the Western District of Missouri, on the 22d day of July, 1918 (Rec. 46,) for One Thousand Seven Hundred Twenty Three Dollars Ninety Three cents ($1,723.93), and an attorney's fee of Three Hundred Dollars ($300.-00,) which was taxed as costs. A writ of error was sued out in the Circuit Court of Appeals for the Eighth Circuit, which court, on April 5, 1921, affirmed the judgment of the District Court (Rec. 52, 272 Fed. 681).

A petition for rehearing was duly filed by defendant, (Rec. 53,) which was denied on July 22, 1921 (Rec. 59.)

The case is in this court upon a writ of error duly sued out, on September 10, 1921 (Rec. 60).

It is defendant's position that plaintiff was not entitled to recover for the reasons:

1. That the two-year statute of limitations, contained in Section 16 of the Interstate Commerce Act, applies to all claims, for damages, of which the Interstate Commerce Commission has jurisdiction, whether such jurisdiction is exclusive, or is concurrent with the courts, and plaintiff's claims are, therefore, barred by the said statute of limitations.

2. That plaintiff's suit was based upon a prior decision of the Interstate Commerce Commission, and necessarily so, for the reason that it involved questions of which the Commission has exclusive primary jurisdiction, and plaintiff's claims are, therefore, barred by the two-year statute of limitations.

3. That if plaintiff's case was not based on such prior decision of the Commission, he failed to prove facts sufficient to entitle him to recover, and the demurrer to the evidence should have been sustained.

As above stated, the errors relied upon are the failure of the court to hold that the causes of action sued upon by plaintiff were barred by the two-year statute of limitations contained in Section 16 of the Act to Regulate Commerce, and that plaintiff failed to prove facts sufficient to make out a case. Defendant specifies the errors of the lower court as follows:

SPECIFICATION OF ERRORS.

I.

The Circuit Court of Appeals erred in that the causes of action, if any, in each and every one of the counts in plaintiff's petition, are and were barred by the statute of limitations applicable in such cases.

II.

The Circuit Court of Appeals erred in failing to hold that each of said causes of action presented a question exclusively within the primary jurisdiction of the Interstate Commerce Commission, and was therefore barred and extinguished because not filed or sued on within two years after accrual, as provided in the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory and supplemental thereto, and especially Section 16 thereof.

III.

The Circuit Court of Appeals erred in failing to hold that, whether the Interstate Commerce Commission had such exclusive primary jurisdiction or not, each of said causes of action was barred and extinguished under the provisions of the said Act to Regulate Commerce, whether filed or sued on before the Interstate Commerce Commission or in Court.

IV.

The Circuit Court of Appeals erred in not holding that this action was based upon a prior order or finding of the Interstate Commerce Commission interpreting and construing the tariff rule here involved, and that, consequently, claims of plaintiff, as set out in his petition, were barred and extinguished by the statute of limitations with reference to such claims, as provided in the

Act to Regulate Commerce, and acts amendatory thereof and supplementary thereto.

V.

The Circuit Court of Appeals erred in sustaining the action of the District Court in overruling the demurrer of the defendant at the close of all the evidence in words and figures as follows to-wit:

At the close of all the evidence, the Court declares the law to be that under the pleadings and the evidence the plaintiff is not entitled to recover upon the following counts of plaintiff's petition; or upon any of them:

Counts 1, 3, 5, 6, 8, 13, 16, 16½, 22, 24, 25, 31, 33, 36, 37, 42, 43, 46, 47, 49, 64, 67, 74, 75, 76, 79, 80, 81, 83, 87, 88, 90, 92, 93, 97, 98, 101, 102, 103, 106, 107, 109, 113, 114, 116, 118, 122, 125, 130, 132, 140, 141.

VI.

The Circuit Court of Appeals erred in affirming the judgment of the District Court in this cause, on each count of the petition above referred to, in favor of the plaintiff and against the defendant.

VII.

The Circuit Court of Appeals erred in not holding that the plaintiff had not met the burden of proof upon him, on account of his failure to show that the shipments involved in this case were less than carload shipments, to which class of shipments only, the rule in controversy was applicable.

VIII.

The Circuit Court of appeals erred in affirming the judgment of the District Court in favor of the plaintiff, because, upon the entire record and evidence and under the law, judgment should have been entered herein for the defendant.

ARGUMENT.

I.

Plaintiff's claims are barred because all claims for damages, under Section 9 of the Interstate Commerce Act, are barred by the two-year limitation prescribed in Section 16 of the Act, whether claimant proceeds before the Commission or in Court.

The Circuit Court of Appeals, as we understand its decision, in this case, holds that if a claim for damages, on account of an alleged violation of the provisions of the Interstate Commerce Act, can be the subject of an original action in court, and the action is brought in court, and not before the Commission, the two-year statute of limitations provided in Section 16 does not apply, with the result that, in that event, such an action is governed by the varying statutes of limitations of the different states, depending on the state in which the suit may be brought.

The Circuit Court of Appeals (R. 52) says:

> The controlling question in the case is whether the claims for repayment of the overcharges might be the subject of an original action in court, or on the other hand, should first have been submitted to the Interstate Commerce Commission (Interstate Commerce Act. Secs. 9, 16 and 22, 24 Stat. 379; 34 Stat. 584; 41 Stat. 491.) The former procedure was adopted in this case. If the latter should have been followed the claims were barred by the limitation provided in Sec. 16.

Section 9 of the Act provides:

> That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act, may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery

of the damages for which such common carrier may be liable under the provisions of this Act in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies and must, in each case, elect which one of the two methods of procedure herein provided for he or they will adopt.

Section 16 of the Act provides:

> All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.

It is our position, as stated above, that the two year statute of limitations, provided in Section 16 of the Interstate Commerce Act, applies to all claims for damages, under Section 9, whether they may be the subject of an original action in court, or must first be submitted to the Interstate Commerce Commission.

As we have already pointed out, in the statement of the case, all the causes of action involved in this suit were barred, if this two year statute of limitation applies, since, under the stipulation filed in the case (Rec. 47,) they accrued between the dates of May 9, 1910, and May 30, 1912 (Rec. 29-45,) and suit was not filed until May 12, 1915.

In the case of *Phillips Co. v. Grand Trunk Western R. Co.*, 236 U. S. 662, the Phillips Company brought suit to recover alleged overcharges on shipments of lumber. The suit was brought directly in the United States Circuit Court, and was based on a prior decision of the Interstate Commerce Commission, in which it was held that the lumber rate involved was unreasonable. This court held that, although the Phillips Company was not a party to the complaint filed before the Commission, it was entitled to maintain a suit in court, based upon the Com-

mission's general finding that the rate charged was excessive, but held further that the Phillips Company was obliged to assert its claim within the time fixed by law, and that, although its suit was brought in court, the two year statute of limitations quoted above applied, whether the complaint was filed before the Commission, or suit was brought in court.

The court gave the following reasons for this holding:

> It is argued, however, that under the conformity act (Rev. Stat. Sec. 914, Comp. Stat. 1913, Sec. 1537,) the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, *and not after. Under such a statute the lapse of time not only bars the remedy, but destroys the liability* (*Finn v. United States*, 123 U. S. 227, 232, 31 L. ed. 128, 130, 8 Sup. Ct. Rep. 82,) *whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction.* This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. *To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction;* or to permit a railroad company to plead the statute of

> limitations as against some, and to waive it as against others, *would be to prefer some and discriminate against others, in violation of the terms of the commerce act*, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here, and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action.

(The italics in all quotations are ours, with immaterial exceptions).

The Phillips case, it is true, involved an alleged unreasonable rate, a question of which the Interstate Commerce Commission has exclusive primary jurisdiction. The Circuit Court of Appeals has confined the principle of the Phillips decision to such cases. But the reasons stated by this court, for holding, in the Phillips case, that the two-year statute of limitations is applicable, whether complaint is filed with the Commission or suit is brought in court, are equally applicable whether the question is one of which the Commission has exclusive primary jurisdiction, or not. The two-year statute, by its terms, applies to all claims for damages filed before the Commission, whether it has exclusive primary jurisdiction of such claims, on account of the questions involved, or concurrent jurisdiction with a court of competent jurisdiction. The purposes of the Act, we submit, require that the two-year statute should

also apply to all such claims which are sued on in court. The present case is a good illustration of the discrimination and preference that would otherwise result.

If plaintiff is permitted to recover, in this case, on causes of action which accrued more than two years before the suit was brought, there would be this situation: Any shipper who filed a comlaint before the Commission, upon the question here involved, would have the two-year statute applied to his claims which were filed with the Commission, but the plaintiff herein, or any other claimant, by bringing suit, not before the Commission, but in court, could recover on all claims which were not barred by the state statute of limitations of 5 or 10 years, or whatever it was.

A claimant could file claims on which the two-year statute had not run, before the Commission, and bring suit in court on the claims as to which the statute had run, relying on the decision of the Commission, if favorable, to secure a favorable result in court, as was, in effect, done in this case.

As this court said, in the Phillips Company case:

> To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states where a suit was brought in a court of competent jurisdiction.....would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished.

It seems too clear for argument that the two-year statute of limitations must apply to all such claims for damages, whether they are such as must be considered, in the first instance, by the Commission, or are such as may, at plaintiff's election, be prosecuted either before the Commission or in court, since any other construction

of the act would give rise to discrimination, and preference of some shippers as against others.

Congress has now further carried out this purpose of securing uniformity of treatment of shippers, under the Interstate Commerce Act, by providing one uniform statute of limitations upon suits of carriers for the recovery of their charges. Paragraph 3 of Section 16 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, provides:

> All actions at law by carriers, subject to this act, for recovery of their charges, or any part therof, shall be begun within three years from the time the cause of action accrues, and not after.

On November 10, 1919, Mr. Esch, on behalf of the Commmittee on Interstate and Foreign Commerce, submitted the following report (H. R. 456), on the bill (H. R. 10453) which finally became the Transportation Act, 1920. On page 30, the committee says, with regard to the above amendment to Section 16:

> *Limitation of actions by and against carriers*: Section 422 amends Section 16 of the commerce act so as to limit the period in which carriers may bring actions for the recovery of their charges to three years from the time the cause of action accrued. Complaints for the recovery of damages by the shipper are to be filed by the shipper within two years from the time the cause of action accrues. In order to cover the case where the carrier, when the shipper's right of action has expired, begins an action for damages in respect to the same service on which the shipper's complaint is based, the shipper's period of two years is extended to 90 days from the time action by the carrier is begun. The amendment also provides that in case either of action by the carrier or of complaint by the shippers, the cause of action shall be deemed to accrue upon delivery or tender of delivery by the carrier.

Obviously, if the Circuit Court of Appeals is correct, there is no need, in the case of many claims, for the provision that the shipper's period of two years shall be extended 90 days from the time when action by the carrier is begun, since in most jurisdictions this would reduce, instead of extending, the period within which an action may be begun under the state laws. It is also to be noted that the Committee says, without qualification:

> Complaints for the recovery of damages by the shipper are to be filed by the shipper within two years from the time the cause of action accrues.

Congress is presumed to have known of the decision of this court in the Phillips case, and would undoubtedly have changed the wording of the two-year statute, if this court's construction of it had been contrary to its intention. Instead of doing this, Congress added provisions to Section 16 which were harmonious with the construction of the two-year statute which is contended for by us.

As pointed out by this court in the Phillips case, *supra*, and in the case of *United States v. Interstate Commerce Commission*, 246 U. S. 638, this two-year statute is not an ordinary statute of limitations, but is a statute which extinguishes the right of action.

Obviously, if the right of action is extinguished, it cannot be sued upon, in any tribunal, after the period of limitation has run.

The principle is similar to that which governs with regard to a suit which may be brought in a different jurisdiction from that in which the cause of action arises. If there is only an ordinary statute of limitations in the jurisdiction where the cause of action arises, the statute of limitations, which is in effect in the jurisdiction where the suit is brought, governs, but if the statute, which

gives the right of action, also conditions that right, by limiting the time within which suit may be brought, the latter condition limits the right, no matter where the suit may be brought, and regardless of the statute of limitations applying in the particular forum. *Osborne* v. *Grand Trunk Ry.*, 88 Atl. 513; *Davis* v. *Mills*, 194 U. S. 451; *T. & N. O. R. Co.* v. *Miller*, 221 U. S. 408; *A. T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55.

We contend, therefore, that the two-year limitation contained in Section 16 of the Interstate Commerce Act, extinguishes all such claims, by shippers, whether such claims are cognizable solely by the Interstate Commerce Commission, or are cognizable, at plaintiff's election, either before the Commission, or a court; and consequently, that plaintiff's claims are barred, in either event, since they accrued more than two years before suit was brought. If we are correct in this contention, obviously it requires the reversal of the case, regardless of the court's decision on the propositions which follow.

We shall further endeavor to show, however, that this case was based upon the decision in the Gees case, *supra*, and that it involved questions which must primarily be decided by the Interstate Commerce Commission; and, therefore, that plaintiff's claims were, under the decision in the Phillips case, barred by the two-years' statute of limitations, whether our first proposition is sustained, or not.

II

Plaintiff's suit was based upon the decision of the Interstate Commerce Commission in the Gees case, supra, **and necessarily so, and is, therefore, barred by the Statute of Limitations contained in Section 16 of the Interstate Commerce Act.**

As already stated, all the claims sued on had accrued more than two years prior to the bringing of plaintiff's suit (Rec. 31-47).

By saying that plaintiff's suit was based upon the decision of the Interstate Commerce Commission in the Gees case, *supra*, we mean this:

Neither the plaintiff nor the defendant in this case was a party to the Gees case. This court held, however, (in the Phillips case, *supra*, as set forth in the first syllabus), 35 Sup. Ct. Rep. 444:

> A shipper who was not a party to the proceedings before the Interstate Commerce Commission to have an increase in freight rates declared to be unreasonable, may maintain a reparation claim by appropriate proceedings before the Commission, or the courts, based upon the Commission's general finding that such increase was unreasonable.

Assuming, for the sake of argument, that plaintiff could base his case on the decision in the Gees case, on the general propositions involved,—although we consider it doubtful whether plaintiff could do this, since defendant has not had its day in court on these propositions,—we contended further that plaintiff, having treated the decision of the Commission in the Gees case as controlling, as we contend that he did do in practical effect, he is bound, by the further holding of this court in the Phillips case, that his claims are subject to the two year statute of limitations contained in Section 16.

Plaintiff alleged, among other things, in his petition (Rec. 3-5):

> That pursuant to an act passed by the Congress of the United States, entitled "An Act to regulate commerce," approved February 4th, 1887, and acts amendatory and supplementary thereto, and pursuant further to a ruling and order made and entered by the Interstate Commerce Commission on the 18th day of February, 1915, said Interstate Commerce Commission made and entered its order, defining, determining and construing the lawful and prevailing rate and weight governing and controlling said shipment, to-wit: the actual weight based upon the published tariff rate on "less than car-load" shipment and to which defendant carrier was by law entitled and plaintiff alleges that the amount so paid defendant by said owner was paid without said owner's acquiescence and was unlawful and unjust.
>
> That such true and lawful tariff rate has at all times been duly and regularly published and filed with the Interstate Commerce Commission.

Plaintiff offered in evidence the decision of the Commission in the case entitled I. & S. Docket No. 210, Refrigeration Charges on Kansas City Southern Railway, 26 I. C. C. 617, which, as hereafter explained, involved the cancellation of this less-than-carload rate on shipments from certain points, but Judge Van Valkenburgh stated that he took judicial notice of the Interstate Commerce Commission's reports and that, therefore, it was unnecessary to offer them in evidence (Rec. 16). It was for this reason, we assume, that plaintiff did not offer in evidence the decision in the Gees case, *supra*, which was rendered February 18, 1915, (Appendix A), as stated in plaintiffs petition.

Plaintiff was, therefore, understood by us to base his suit, in accordance with the principle stated by this court in the Phillips case, *supra*, on the decision in the

Gees case, and, as we shall endeavor to show, in proposition III of this brief, plaintiff failed to make out a case on the merits, unless he did base his case on a prior decision of the Commission.

Having presented his case on this theory, plaintiff is bound by it, and this case is governed by the decision of this court in the Phillips case, *supra*, which holds that a case can be made out by relying on a decision of the Commission on the same question, but which holds further that the two year statute of limitations applies. *Pennsylvania R. Co.* v. *Clark Bros.*, 238 U. S. 456.

It is our further contention, however, that the question involved in this case was one which required a decision, by the Commission, in the first instance.

The character of the questions involved in this case can best be shown by quoting considerably at length from the decision of the Commission in the Gees case (Appendix A):

> Complainant is a corporation engaged in the wholesale fruit and produce business at Kansas City, Mo. By complaint filed August 18, 1913, it alleges that the charges collected by defendant for the transportation of 516 thirty-pound crates of strawberries from Springdale, Ark., to Kansas City, on the basis of carload rates, were unreasonable, unjustly discrimaintory and unlawful in that they exceeded those which would have accrued on the basis of actual weight at less-than-carload rate. Reparation is asked.
>
> The shipment described in the complaint weighed 15,480 pounds and moved via the defendant's line May 14, 1912. Charges were collected theron on May 21, 1912, in the sum of $125.80, based on a carload rate of 53 cents per 100 pounds for the transporation of the commodity, plus a charge of 21 cents per 100 pounds for refrigeration applied, in each instance, on the minimum of 17,000 pounds.
>
> At the time this shipment moved supplement

No. 8 to defendant's tariff, No. 350-D, I. C. C. No. 6170, which is governed by western classification and exceptions thereto, contained a less-than-carload rate from Springdale to Kansas City of 76 cents per 100 pounds, including refrigeration. This tariff, by specific reference, authorized the use of Southwestern Lines Commodity Tariff, No. 2-L Leland's I. C. C. No. 844, Item 42½, of supplement No. 9, which reads as follows:

Less-than-carload shipments of freight requiring refrigerator cars will be transported in refrigerator cars when regularly scheduled refrigerator car service is available from point of shipment to destination, at less-than-carload ratings and rates provided for in classifications and tariffs lawfully on file with the Interstate Commerce Commission.

When a shipper cannot avail himself of the regularly scheduled refrigerator car service, refrigerator cars will be furnished, provided the shipper is willing to pay charges on weight of not less than 10,000 pounds, at the less-than-carload rates.

Both parties agree that the question in issue is the proper interpretation of the above tariff provision. At the time the shipment in question moved the defendant had no regularly scheduled refrigerator car service from Springdale to Kansas City, and the complainant therefore insists that the less-than-carload rate of 76 cents should apply under the last paragraph of the above rule. At this rate the charge for the shipment, based on the actual weight, would be $117.65, instead of $125.80. *The car in which the shipment moved was furnished as requested and no commodity other than strawberries was loaded therein.*

The defendant claims that the second paragraph of the above rule was not applicable to the shipment in question, because (1) *the rule does not entitle the shipper to the exclusive use of the car;* (2) *the rule, "when properly interpreted" does not apply to shipments of strawberries.*

In support of its first contention,—that the above

rule did not contemplate the exclusive use of a car by a shipper, the defendant insists that it is incumbent upon a shipper, when ordering a car, to indicate whether a carload service or a less-than-carload service is desired. When the car in question was ordered no specific advice was given as to which service was desired, and the defendant assumed that the complainant wanted carload service. *The record shows, however, and the defendant admits, that it is difficult, if not impossible to move strawberries satisfactorily in less-than-carload quantities in the same car with other freight.*

In support of its second contention—that the tariff provision above quoted was not intended to apply to shipments of strawberries—the defendant claims that is was intended to apply only to shipments of dairy products. The rule, however, is without restriction or limitation, and the intention with which it was made can not be permitted to give it a meaning other than that which plainly appears on its face.

If the complainant's contention is sustained, there is no doubt that it will have obtained what was substantially a carload service at a lower charge than would have accrued at the rate applicable to carload shipments. It is clear, however, that this was permitted by the tariff. If the rule results in injustice, the difficulty should be removed by changing the rule and not by giving to it an interpretation which is not warranted by its language.

After the decision of the Commission in the Gees case, the plaintiff in this suit intervened in the receivership of the St. Louis & San Francisco Railroad Company, and presented similar claims for overcharges against the St. Louis & San Francisco Railroad Company. The question came up for decision before Circuit Judge Sanborn, and his decision is printed, for the convenience of this court, as Appendix B to this brief.

In holding that the question involved was one which

was exclusively for the Interstate Commerce Commission, in the first instance, Judge Sanborn said:

> Two classes of action for damages arise out of the conduct of transportation in interstate commerce, those which may not be maintained until after a decision by the Interstate Commerce Commission of some issue material to a recovery by the complainants (citing cases), and those in which an action may be maintained without the previous decision by the Interstate Commerce Commission of any question material to a recovery.....
>
> The courts have not undertaken to state, and perhaps it is not wise to try to set forth, the line of demarcation between these classes in view of the multitudinous and differing circumstances which necessarily condition the numerous cases which have arisen and will arise out of the vast business of transportation in interstate commerce. The Supreme Court, however, has treated each case as it has come before it and has given its reasons for its decisions, and from the opinions in these cases the conclusion may be safely drawn that cases which involve the questions whether or not certain articles fall under specified tariff rates or rules, 234 U. S. 141, 142, 143, 145, 146, *supra*, whether or not certain duties are imposed on carriers and shippers or certain privileges granted to them by specified tariff rates or rules, 240 U. S. 43, 47, 50, 51, whether or not certain rates or tariffs are unreasonable or discriminatory, or unduly preferential, 204 U. S. 439, 446, 448; 230 U. S. 247, 250, 255, 256, 304, 312, 313; 222 U. S. 506, 508, 509, 510, 511, fall in the first class and require, as an indispensable condition of the maintenance of actions therein in courts, a previous decision of such questions by the Interstate Commerce Commission; and that cases which do not involve such issues, but simply question the violation or discriminatory enforcement of an admittedly fair tariff rate or rule, 237 U. S. 129, 130, 131, 132, 134, or the constitutional

or common law rights and duties of carriers and shippers in relation to matters other than tariff rates and rules, 223 U. S. 70, 83, 84; 238 U. S. 275, 281, 283, generally fall in the second class and require no previous determination or action of the Interstate Commerce Commission to enable parties who deem themselves injured to maintain their actions for damages in the courts. Cases necessarily arise which it is not easy properly to classify, but the case in hand does not seem to be of that character. It presents the question whether shipments of strawberries in refrigerator cars, exclusively occupied by these shipments, were legally subject to the established tariffs, rates and rules for the transportation and refrigeration of carload lots, or to the established rates and rules for the transportation and refrigeration of less than carload lots under the confused and complicated tariffs and rules which have been set forth and the conflicting evidence to which reference has been made. The question is one of tariff rates and tariff rules, one peculiarly within the administrative jurisdiction of the Interstate Commerce Commission, one which, if it were open to the determination of every court in which an action involving it might be brought, would be very likely to result in conflicting decisions. Under other evidence and in the absence of the evidence of Frisco Tariff 6-H, I. C. C. 5985, which is a part of the evidence in this case, a like question was submitted to and decided by the Interstate Commerce Commission as appears in its unreported opinion in *Gees Commission Co.* v. *St. L. & S. F. R. R. Co.*, No. A-992. Neither the complainant, however, nor any of his assignors were parties to that case, or had filed any claim with the commission for any of the overcharges here in controversy before that decision was rendered. So that the decision in that case does not render the question before this court *res adjudicata*, and if this court should now consider this question on its merits under the differing evidence here in hand, as it must do if it considers it at all, and should then reach a conclusion opposite to that disclosed

in the opinion of the Commission, the lack of that uniformity of decision and action on such questions which Congress sought to secure by the Act to Regulate Commerce would be well illustrated.

Counsel for the intervener argues with enviable ability, zeal and persistence that, as the existence of all the tariffs and rules relative to the matter at issue is conceded, this proceeding is nothing but an action to recover overcharges made in clear violation of plain rules and tariffs, because, as he contends, it is perfectly clear that the shipments fall under the less than carload rates of transportation and refrigeration, and therefore this action falls in the second class and it may be maintained without any decision by the Interstate Commerce Commission of the question whether or not the shipments fell under the carload or the less than carload rates. If the fact were admitted, or if it were established beyond reasonable question, that the shipments fall under the less than carload rates, this contention might prevail. But the real issue, the doubtful question, in this case is whether they fell under the carload or the less than carload rates and rules and that is a much more doubtful question under the evidence in this record than the question whether or not oak railway cross ties fell under the established tariff rate for oak lumber was in *Texas & Pacific Ry. Co.* v. *American Tie Company*, 234 U. S. 138, 147, and after a careful reading and thoughtful consideration of the opinions of the Supreme Court on the question here at issue the conclusion is that the claim of the intervener falls in the first class of cases specified in this opinion, and that it cannot be lawfully allowed by this court in the absence of a previous conclusive determination of the rate issues involved in it by the Interstate Commerce Commission.

For the purpose of further illustrating the questions involved, we ask the indulgence of the court while we quote from a few decisions of the Commission.

In the case of *Ozark Fruit Growers Assn.* v. *St. L. & S. F. Ry. Co.*, 16 I. C. C. 106, the Commission dealt with the question of the proper minimum weight, for carloads of strawberry shipments, in the very territory in which the shipments involved in this case were made. The complaintant claimed that the minimum weight on carload shipments should be "14,400 lbs. based on 480 crates, weight 30 lbs. each" (page 107). The Commission said (pages 108, 109):

> At present the originating carriers charge on a minimum of 17,000 pounds, which is practically 567 crates of strawberries of 30 pounds each, claiming that that weight may be loaded and properly refrigerated. Complainants contend that the minima should not exceed 480 crates, or 14,400 pounds. There is no dispute but that a much greater weight than 17,000 pounds of strawberries may be loaded in a car, the question here turning not upon the capacity of the car, but upon the weight that may be transportated under refrigeration without injury. * * *
>
> During one year there were shipping points in this territory where the maximum load was 510 crates, or 15,300 pounds, and it is only fair to presume that the refrigeration was more satisfactory than in cases where the load was 567 crates. There was some dispute as to this, but it would seem to follow necessarily that they would be better refrigerated, owing to the well-known law of physics that heated air, which injures the berries, rises to the top of the car.
>
> In the determination of a qestion of this kind by the Commission, however, it would seem that the interest of the shipper demands that the minimum should be fixed as high as the product may be carried under the *most* advantageous circumstances, and that the rate per 100 pounds should be made as low as possible, based on this high minimum. The reason for this is that *if the shipper deems it advantageous to ship fewer crates in a car, the only*

penalty upon him is that he will have to pay a somewhat higher rate per crate, depending upon how much below the minimum he loads. A high minimum and a low rate automatically adjust themselves to the needs of the shipper, while returning to the carrier the same revenue for the use of its car, which is only fair, as the car and refrigeration are the same to the carrier whether 480 or 567 crates are in the car.

See also:

Providence Fruit & Produce Exchange v. *American Express Co.*, 51 I. C. C. 167.

Ponchatoula Farmers Asso. v. *I. C. R. R. Co.*, 19 I. C. C. 513, 517.

Timmons v. *B. C. & A. Ry. Co.*, 55 *I. C. C.* 495, 498.

In I. & S. Docket No. 210, Refrigeration Charges on Kansas City Southern Railway, 26 I. C. C. 617, the Commission decided, on April 7, 1913, the question whether the defendant should be permitted to cancel the less-than-carload rate involved in this suit, on shipments from certain points. In holding that the defendant should be permitted to do so, the Commission said:

> The Kansas City Southern contends in justification of its action under the proposed tariff that *this rule was never intended for application on strawberries*, fruits, and vegetables, but was established to meet the action of other carriers which absorbed the refrigeration charge on butter, eggs, and dressed poultry from Missouri River cities to New Orleans. . . . It has only been within the past year, according to the witness for the Kansas City Southern, that the shippers of strawberries have sought to avail themselves of the provisions of the rule in question. . . . It is contended that the revenue derived from this strawberry traffic is insufficient.
>
> . . .
>
> Upon full consideration of the facts of record we are of opinion that the present refrigeration

charge of $35.70 from the stations Joplin to Shady Point, inclusive, on the Kansas City Southern and subsidiaries to Topeka should be permitted to go into effect. *Strawberries, perhaps more than other perishable commodities, require the highest standard of both freight and refrigeration service, and frequently subject the carriers to substantial claims for damage when that service is not rendered according to schedule.* It is true the percentage of increase under the proposed tariff is high, but it seems apparent that we can not view this case as might more reasonably be demanded if this rule had been intentionally established on this particular traffic after due investigation by the carriers. We make this observation in the full understanding that *the rule is not restricted to any particular traffic under its terms, although it is perhaps susceptible to doubtful construction in certain other respects.* Upon the whole we do not consider it to be a commendable provision from the standpoint of tariff construction, and the mere fact of its incorporation in a tariff publication to meet a condition on particular traffic does not justify a requirement by order of its application and continuance on other commodities from which the freight revenue per car after the refrigeration absorption is clearly unremunerative.

In the case of *Lindsay & Co. v. Northern Express Co.*, 33 I. C. C. 394, 397, the Commission said:

> Complainants concede that with the former spread between the carload and less-than-carload rates which they claim was too small, there were compensating advantages which accrued to the shipper in carloads. *For one thing, the berries in carloads reach the consumer in better condition, due to better refrigeration than is possible with less-than-carload lots.*
>
> It avails little, in endeavoring to dispose of these questions, to know that in other sections of the country the percentage relation of carload to

less-than-carload express rates for extremely long hauls of strawberries is less than here. *The record does not show that there is any such long-haul movement in less-than-carload lots. Indeed, the perishable nature of the commodity makes such movement very improbable.*

The services rendered by carriers in connection with the less-than-carload movement differ in nature and extent from those incident to carload movement, whether by freight or express.

So far as we are informed, the latest decision by this court as to the character of questions which must first be determined by the Interstate Commerce Commission is the case of *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 42 Sup. Ct. 477, decided May 29, 1922. In that case, the court said:

When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instruction from the court as to how the document shall be construed if the jury finds that the alleged peculiar meaning or usage is established. *But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is*

necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law,—but upon whether or not a particular judge or jury had found, as a fact that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed.

It may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction. The dispute may be merely whether words in the tariff were used in their ordinary meaning, or in a peculiar meaning. This was the situation in the American Tie & Timber Co. Case, supra. The legal issue was whether the carrier did or did not have in effect a rate covering oak ties. The only matter really in issue was whether the word "lumber," which was in the tariff, had been used in a peculiar sense. The trial judge charged the jury: "If you believe from the evidence that oak railway crossties are lumber within the meaning and usage of the lumber and railroad business, then you are charged the defendant had in effect a rate applying on the ties offered for shipment." This question was obviously not one of construction; and there is not to be found in the opinion in this court, or in the proceedings in either of the lower courts, a suggestion that the case involved any disputed question of construction. The only real question in the case was one of fact; and upon this question of fact "the views of men engaged in the lumber and railroad business, as developed in the testimony," were in "irreconcilable conflict." P. 146. As that question unlike one of construction, could not be settled

ultimately by this court, preliminary resort to the Commission was necessary to insure uniformity.

In the present case, there were two difficult questions:

1. Whether the less-than-carload rate contended for by plaintiff applied to strawberries, and

2. Whether a shipper enjoying the exclusive use of a car, and the superior carload service, should be permitted to claim the less-than-carload rate.

It appears, from the above quoted decisions, that

> It is difficult, if not impossible, to move strawberries satisfactorily in less-than-carload quantities in the same car with other freight. Gees case, *supra*.
>
> Strawberries, perhaps more than other perishable commodities, require the highest standard of both freight and refrigeration service. I. & S. Docket No. 210, *supra*.
>
> Berries in carloads reach the consumer in better condition, due to better refrigeration than is possible with less-than-carload lots. * * * The record does not show that there is any such long-haul movement in less-than-carload lots. Indeed, the perishable nature of the commodity makes such movement very improbable. *Lindsay* v. *Northern Express Co.* case, *supra*.

It is to be noted that the last case is an Express Company case, and express service, is of course much faster than freight service.

The shipper may find it advantageous to ship less than the minimum carload, while paying the carload rate, in order to secure better refrigeration. *Ozark Fruit Growers Assn.* v. *St. L. & S. F. Ry. Co.*, *supra*.

The shipments were what are ordinarily termed carload shipments; that is, "no commodity other than strawberries was loaded therein." Gees case, *supra*.

The record in the present case shows that plaintiff's shipments were what are ordinarily termed carload shipments, the shipper billing out the car by its initials and number (Rec. 20, 31-34).

> Where less-than-carloads are shipped the carriers have the privilege, and it is their rule and custom, to open the cars containing such shipments at way stations to put in and take out freight and to carry such cars and shipments on slower trains than those used for carload lots; that while it is practicable to do this with many perishable products it is common knowledge that it is impracticable to carry strawberries long distances in interstate commerce in this way because they become tainted and perish under such treatment before they reach their destination. *North American Co.* v. *St. Louis & San Francisco Railroad Co.*, (Appendix B).
>
> If the complainant's contention is sustained there is no doubt it will have obtained what was substantially a carload service at a lower charge than would have accrued at the rate applicable to carload shipments. Gees case, *supra*.

It appears to us that, under these facts, courts and juries would reach different conclusions, and, in the words of this court in *Great Northern Railway Company* v. *Merchants Elevator Company*, *supra*, in order that there should be uniformity of decision, "the preliminary determination must be made by the Commission."

As this court said in the American Tie & Timber Co. case regarding a similar question, "the views of men engaged in the lumber and railroad business," were in "irreconcilable conflict."

As we have shown, this was a matter which was in controversy, not only on the line of the Kansas City Southern, but also on the line of the St. Louis & San Francisco Railroad Company. With reference to shipments on the line of the St. Louis & San Francisco

Railroad Company, the matter was submitted to the Commission and decided by it in the Gees case (Appendix A).

We now pass to our third point.

III.

If plaintiff did not base his case on the decision of the Interstate Commerce Commission, he failed to make out a case.

The tariff, which plaintiff contended applied to his shipments, clearly applied, by its terms, only to less-than-carload shipments.

Rule 319 (a) provided:

> Where shippers cannot avail themselves of a regularly scheduled refrigator car service, refrigerator cars may be furnished for less-than-carload freight at the less-than-carload rates.

In order to be entitled to this less-than-carload rate, plaintiff was clearly required to tender his shipments as shipments of less-than-carload freight. No evidence was offered by plaintiff to show that the shipments were tendered to or accepted by the carrier as less-than-carload shipments.

The Circuit Court of Appeals erroneously says, in its decision, in the present case (Rec. 52):

> The published tariffs of the railway company specified two rates for the shipment of strawberries in carload lots, the higher rate carrying an additional charge for icing, and the lower not.

As the Commission and Judge Sanborn correctly state, however, the question was whether the carload or less-than-carload rate was applicable. *Gees case, and*

case of North American Co. v. St. Louis & San Francisco Railroad Company, supra.

These were what are ordinarily termed carload shipments, that is, the shipper billed out the entire car (Rec. 20, 31-34). The weights of these shipments varied from 11,640 pounds to 17,310 pounds, and the average weight of the shipments was 15,700 pounds (Rec. 34-36).

As Judge Sanborn states, in his decision in *North American Co. v. St. Louis & San Francisco Railroad Co. supra*, the carrier in the case of less-than-carload shipments has the right to use the additional space in the car, whereas the carrier does not have such a right in the case of carload shipments.

There was nothing about the weights of these shipments to indicate that they were intended to be less-than-carload shipments. *Ozark Fruit Growers Assn. v. St. Louis & S. F. Ry. Co., supra.*

It was incumbent upon the plaintiff to prove his case, and as he claimed that he was entitled to the less-than-carload rate, it was incumbent upon him to prove that the shipments were tendered to the carrier as less-than-carload shipments.

We also submit that the plaintiff was required to put in evidence the tariffs containing the carload and less-than-carload rates, in order that the court might determine which rate applied, if (which, however, we deny) the court had jurisdiction to determine this question. So far as we can find, no such evidence was introduced. All that we can find in this connection is contained in the stipulation, paragraphs 6-8, 10-17 (Rec. 30, 43-45). The letter, on pages 20 and 21 of the Record, refers to other shipments to another destination, even if otherwise sufficient, which is denied. We, therefore, contend that the plaintiff also failed in his proof on this point.

For all the reasons stated above, it is respectfully submitted that plaintiff is not entitled to recover, and the decision of the lower court should be reversed.

FRANK H. MOORE,
CYRUS CRANE,
GEORGE H. MUCKLEY,
Attorneys for Plaintiff in Error.

SAMUEL W. MOORE, of Counsel.

APPENDIX A.

Unreported Opinion No. A-992

INTERSTATE COMMERCE COMMISSION.

No. 6102.

R. W. Gees Commission Company,

vs.

St. Louis & San Francisco Railroad Company, and Thos. H. West, W. C. Nixon and W. B. Biddle, Receivers Thereof

Submitted July 6, 1914. *Decided February* 18, 1915.

Reparation awarded on account of overcharge collected by defendant for the transportation of a shipment of strawberries from Springdale, Ark., to Kansas City, Mo.

E. H. Hogueland, for complainant.
Thomas Bond, for defendants.

Report of the Commission.

By the Commission:

"Complainant is a corporation engaged in the wholesale fruit and produce business at Kansas City, Mo. By complaint filed August 18, 1913, it alleges that the charges collected by defendant for the transportation of 516 thirty-pound crates of strawberries from Springdale, Ark., to Kansas City, on the basis of carload rates, were unreasonable, unjustly discriminatory and unlawful in that they exceeded those which would have accrued on the basis of actual weight at less-than-carload rate. Reparation is asked.

The shipment described in the complaint weighed 15,480 pounds and moved via the defendant's line May 14, 1912. Charges were collected thereon on May 21, 1912, in the sum of $125.80, based on a carload rate of 53 cents per 100 pounds for the transportation of the commodity, plus a charge of 21 cents per 100 pounds for refrigeration applied, in each instance, on the minimum of 17,000 pounds.

At the time this shipment moved supplement No. 8 to defendant's tariff, No. 350-D, I. C. C. No. 6170, which is governed by western classification and exceptions thereto, contained a less-than-carload rate from Springdale to Kansas City of 76 cents per 100 pounds, including refrigeration. This tariff, by specific reference, authorized the use of Southwestern Lines Commodity Tarriff, No. 2-L, Leland's I. C. C. No. 844, Item 42½, of supplement No. 9, which reads as follows:

Less than car load shipments of freight requiring refrigerator cars will be transported in refrigerator cars when regularly scheduled refrigerator car service is available from point of shipment to destination, at less-than-carload ratings and rates provided for in classifications and tariffs lawfully on file with the Interstate Commerce Commission.

When a shipper cannot avail himself of the regularly scheduled refrigerator car service, refrigerator cars will be furnished, provided the shipper is willing to pay charges on weight of not less than 10,000 pounds at the less-than-carload rates.

Both parties agree that the question in issue is the proper interpretation of the above tariff provision. At the time the shipment in question moved the defendant had no regularly scheduled refrigerator car service from Springdale to Kansas City, and the complainant therefore insists that the less-than-carload rate of 76 cents

should apply under the last paragraph of the above rule. At this rate the charge for the shipment, based on the actual weight, would be $117.65, instead of $125.80. The car in which the shipment moved was furnished as requested and no commodity other than strawberries was loaded therein.

The defendant claims that the second paragraph of the above rule was not applicable to the shipment in question, because (1) the rule does not entitle the shipper to the execlusive use of the car; (2) the rule, "when properly interpreted" does not apply to shipments of strawberries.

In support of its first contention—that the above rule did not contemplate the exclusive use of a car by a shipper, the defendant insists that it is incumbent upon a shipper, when ordering a car, to indicate whether a carload service or a less-than-carload service is desired. When the car in question was ordered no specific advice was given as to which service was desired, and the defendant assumed that the complainant wanted carload service. The record shows, however, and the defendant admits, that it is difficult, if not impossible to move strawberries satisfactorily in less-than-carload quantities in the same car with other freight.

In support of its second contention—that the tariff provision above quoted was not intended to apply to shipments of strawberries—the defendant claims that it was intended to apply only to shipments of dairy products. The rule however, is without restriction or limitation, and the intention with which it was made can not be permitted to give it a meaning other than that which plainly appears on its face.

If the complainant's contention is sustained there is no doubt that it will have obtained what was substantially a carload service at a lower charge than would

have accrued at the rate applicable to carload shipments. It is clear, however, that this was permitted by the tariff. If the rule results in injustice, the difficulty should be removed by changing the rule and not by giving to it an interpretation which is not warranted by its language.

It is contended by the complainant and the testimony fairly shows that carriers, other than the defendant, participating in the transportation of similar traffic under the rule in question, as well as under a similar rule applicable in trans-Missouri territory, have uniformly construed it as does the complainant, and have made refund thereunder without recourse to the Commission.

Upon all the facts of record we are of opinion and find, that the lawfully established tariff rate applicable to the shipment in question from Springdale to Kansas City was 76 cents per 100 pounds at actual weight, including refrigeration.

We further find that complainant made the shipment herein described; that the charges collected in excess of the lawfully established tariff rate and charge were borne by complainant; and that it has been damaged thereby in an amount represented by the difference between the charges collected and the charges which would have accrued at the rate which is herein found to have been lawfully applicable and that it is therefore entitled to an award at reparation in the sum of $8.15, with interest thereon from May 21, 1912.

An order in accordance with these findings will be entered."

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 18th day of February, A. D. 1915.

R. W. Gees Commission Company, v. *St. Louis* &

San Francisco Railroad Company; and Thos. H. West, W. C. Nixon and W. B. Biddle, Receivers Thereof. No. 6102.

"This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that the above-named defendant be, and it is hereby, authorized and directed to pay unto the complainant, R. W. Gees Commission Company, of Kansas City, Mo., on or before April 15, 1915, the sum of $8.15; with interest thereon at the rate of six per cent per annum from May 21, 1912, as reparation on account of charges collected for the transportation of 516 crates of strawberries from Springdale, Ark., to Kansas City, Mo., which charges so collected have been found to have been in excess of the lawfully published charges, as more fully and at large appears in and by said report of the Commission.

By the Commission:

GEORGE B. McGINTY,
Secretary."

(Seal)

APPENDIX B.

In the United States District Court for the Eastern Division of the Eastern District of Missouri. North American Company, Complainant, vs. St. Louis & San Francisco Railroad Company, Defendant. In Equity, No. 4174. Consolidated Cause.

In the Matter of the Claim of Harry B. Wolf, Intervener, on Exceptions to the Master's Report.

Sanborn, Circuit Judge;

"Harry B. Wolf, the intervener, as the alleged assignee of consignees or consignors of claims for freight charges collected on shipments in interstate commerce of 125 carloads of strawberries which originated on the defendant's railroad, complains of the recommendation of the disallowance of his claims by the Special Master. His third exception is that the Master erred in his conclusion that the issue which decides the validity of these claims is one to be determined primarily by the Interstate Commerce Commission, one over which the courts may not exert authority as an original question, and that none of these claims were filed with the Interstate Commerce Commission, nor in any court within the times respectively limited for such filings by Section 16 of the Act to Regulate Commerce, 24 Stat. 384, as amended by 34 Stat. 590, and 36 Stat. 554; U. S. Comp. Stat. 1916, Sec. 8584, page 9222.

The facts that the lawfully published tariffs and rules of the defendant for the transportation of carloads of strawberries authorized and required the carriers to make and collect the charges they did make and collect and that the shipments all moved in cars devoted to these shipments exclusively, were established.

The fact was also established that there were in

force at the same time tariffs and rules for shipments of less than carload lots under which, if these tariffs and rules were applicable to these shipments, the freight and refrigeration charges would have been less than the amounts charged and collected by the amounts of the alleged overcharge here claimed. The intervener insisted that the less than carload rates governed these shipments and the defendant insisted that they did not, and these contentions present the decisive issue in this case. The fact that these strawberries could not be safely transported without constant and efficient refrigeration service and that they received such service was established, and the tariffs in force specified the rates for that service. There is no dispute about the carload rates for the transportation or the refrigeration of these strawberries and the charges collected were in strict accord therewith. The rate for the transportation may be found in St. Louis and San Francisco Tariff No. 235-G, I. C. C. 6081, minimum weight 17,000 pounds, and for the refrigeration in St. Louis and San Francisco Refrigeration Tariff No. 785-H, I. C. C. 6086, minimum weight 17,000 pounds.

The intervener claims to recover his alleged overcharges under Item 52-½, Supplement No. 9, S. W. L. Tariff No. 2, F. A. Leland's I. C. C. 844, effective April 4, 1912, which reads:

"When a shippper cannot avail himself of the regularly scheduled refrigerator car service, refrigerator cars will be furnished, provided the shipper is willing to pay charges on weight of not less than 10,000 pounds at the less than carload rates. In event the shipment should consist of two or more classes and the amount does not equal 10,000 pounds, the difference between the minimum weight and the weight actually loaded will be charged for on the basis of the lowest rated article contained in the car to make up the minimum charge."

The defendant insists that the foregoing provision was inapplicable to these shipments and it produced testimony tending to show that where less than carload are shipped the carriers have the privelege, and it is their rule and custom, to open the cars containing such shipments at way stations to put in and take out freight and to carry such cars and shipments on slower trains than those used for carload lots; that while it is practicable to do this with many perishable products it is common knowledge that it is impracticable to carry strawberries long distances in interstate commerce in this way because they become tainted and perish under such treatment before they reach their destination. They also call attention to the established fact that Frisco Freight Tariff 6-H, I. C. C. 5985, had been duly published and was in existence when these shipments moved and that it contains these provisions; "The expense of icing refrigerator cars at initial point and of re-icing same in transit for the protection of perishable freight, shall be borne by the shipper, consignee or owner of the property so protected, and no portion of the charges assessed for such service will be refunded. This company will not join with any transportation or refrigeration car line in any arrangement in conflict with this rule."

"When shippers cannot avail themselves of a regularly scheduled refrigerator car service, refrigerator cars may be furnished, provided 10,000 pounds or more are loaded therein at the less than carload rates. Under such circumstances no charge will be made for initial icing, or for re-icing, and when loaded in foreign refrigerators, car will be loaded to run through to destination via the line to which car belongs. This will not apply on peddler cars, or on traffic moving under the tariffs which provide that the expense of icing shipments shall be borne by shippers.

"Charges named herein will not apply on shipments

of perishable freight moving under stated refrigeration charges.

"Stated refrigeration charges are shown in St. L. & S. F. Tariff No. 785-H (I. C. C. No. 6086), Supplements thereto and re-issues thereof."

Two classes of action for damages arise out of the conduct of transportation in interstate commerce, those which may not be maintained until after a decision by the Interstate Commerce Commission of some issue material to a recovery by the complainants. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439, 446, 448; *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 508, 509, 510, 511; *Mitchell Coal & Coke Co. v. Penna. R. R. Co.*, 230 U. S. 247, 250, 255, 256; *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304, 312, 313; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 141, 142, 143, 145, 146; *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50, 51, and those in which an action may be maintained without the previous decision by the Interstate Commerce Commission of any question material to a recovery. *Penna. R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 129, 130, 131, 132, 134; *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 83, 84; *Illinois Central R. R. Co. v. Mulberry Coal Co.*, 238 U. S. 275, 281, 283; *St. Louis & San Francisco R. R. Co. v. Heyser*, 130 S. W. 562. Cases of the first class are governed, and the times and ways of their commencement and prosecution are limited, by the act to regulate commerce as amended, and especially by Section 16 thereof. Cases of the second class are exempt from such limitations.

The courts have not undertaken to state, and perhaps it is not wise to try to set forth, the line of demarcation between these classes in view of the multitudinous and differing circumstances which necessarily condition the numerous cases which have arisen and will arise out

of the vast business of transportation in interstate commerce. The Supreme Court, however, has treated each case as it has come before it and has given its reasons for its decisions, and from the opinions in these cases the conclusion may be safely drawn that cases which involve the questions whether or not certain articles fall under specified tariff rates or rules, 234 U. S. 141, 142, 143, 145, 146, *supra*, whether or not certain duties are imposed on carriers and shippers or certain privileges granted to them by specified tariff rates or rules, 240 U. S. 43, 47, 50, 51, whether or not certain rates or tariffs are unreasonable or discriminatory, or unduly preferential, 204 U. S. 439, 446, 448; 230 U. S. 247, 250, 255, 256, 304, 312, 313; 222 U. S. 506, 508, 509, 510, 511, fall in the first class and require, as an indispensable condition of the maintenance of actions therein in courts, a previous decision of such questions by the Interstate Commerce Commission; and that cases which do not involve such issues, but simply question the violation or discriminatory enforcement of an admittedly fair tariff rate or rule, 237 U. S. 129, 130, 131, 132, 134, or the constitutional or common law rights and duties of carriers and shippers in relation to matters other than tariff rates and rules, 223 U. S. 70, 83, 84, 238 U. S. 275, 281, 283, generally fall in the second class and require no previous determination or action of the Interstate Commerce Commission to enable parties who deem themselves injured to maintain their actions for damages in the courts. Cases necessarily arise which it is not easy properly to classify, but the case in hand does not seem to be of that character. It presents the question whether shipments of strawberries in refrigerator cars, exclusively occupied by these shipments, were legally subject to the established tariffs, rates and rules for the transportation and refrigeration of carload lots, or to the established rates and rules for the transportation and refrigeration of less

than carload lots under the confused and complicated tariffs and rules which have been set forth and the conflicting evidence to which reference has been made. The question is one of tariff rates and tariff rules, one peculiarly within the administrative jurisdiction of the Interstate Commerce Commission, one which, if it were open to the determination of every court in which an action involving it might be brought, would be very likely to result in conflicting decisions. Under other evidence and in the absence of the evidence of Frisco Tariff 6-H, I. C. C. 5985, which is a part of the evidence in this case, a like question was submitted to and decided by the Interstate Commerce Commission as appears in its unreported opinion in *Gees Commission Co. v. St. L. & S. F. R. R. Co.*, No. A-992. Neither the complainant, however, nor any of his assignors were parties to that case, or had filed any claim with the commission for any of the overcharges here in controversy before that decision was rendered. So that the decision in that case does not render the question before this court *res adjudicata*, and if this court should now consider this question on its merits under the differing evidence here in hand, as it must do if it considers it at all, and should then reach a conclusion opposite to that disclosed in the opinion of the Commission, the lack of that uniformity of decision and action on such questions which Congress sought to secure by the Act to Regulate Commerce would be well illustrated.

Counsel for the intervener argues with enviable ability, zeal and persistence that, as the existence of all the tariffs and rules relative to the matter at issue is conceded, this proceeding is nothing but an action to recover overcharges made in clear violation of plain rules and tariffs, because, as he contends, it is perfectly clear that the shipments fall under the less than carload rates of transportation and refrigeration, and therefore this ac-

tion falls in the second class and it may be maintained without any decision by the Interstate Commerce Commission of the question whether or not the shipments fell under the carload or the less than carload rates. If the fact were admtited, or if it were established beyond reasonable question, that the shipments fall under the less than carload rates, this contention might prevail. But the real issue, the doubtful question, in this case is whether they fell under the carload or the less than carload rates and rules and that is a much more doubtful question under the evidence in this record than the question whether or not oak railway cross ties fell under the established tariff rate for oak lumber was in *Texas & Pacific Ry. Co.* v. *American Tie Company*, 234 U. S. 138, 147, and after a careful reading and thoughtful consideration of the opinions of the Supreme Court on the question here at issue the conclusion is that the claim of the intervener falls in the first class of cases specified in this opinion, and that it cannot be lawfully allowed by this court in the absence of a previous conclusive determination of the rate issues involved in it by the Interstate Commerce Commission.

It follows that as the intervener's claim presents a cause of action primarily within the original jurisdiction of the Interstate Commerce Commission, and, in the absence of an adjudication thereof by that Commission, within the jurisdiction of this court, it is subject to the limitations of Section 16 of the Act to regulate Commerce, as amended, 8 U. S. Comp. Stat. Sec. 8584, page 9222, and as neither it nor any part of it was filed with the Commission within two years of the time it accrued, and as no petition for the enforcement of any order of the Commission for the payment of it, or any part of it, was filed in this, or any court, within one year from the date of such order, it is now too late to maintain it.

Phillips Co. v. *Grand Trunk Railway*, 236 U. S. 662, 666. It must, therefore, be disallowed and the third exception to the master's report must be overruled.

This conclusion renders the other exceptions to the report of the master immaterial and on that ground alone, and without considering or deciding the questions of law, or of fact, which these other exceptions suggest, they will be overruled."

No. 194.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

HARRY B. WOLF, CHARLES M. BLACKMAR, HENRY A. BUNDSCHU, DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

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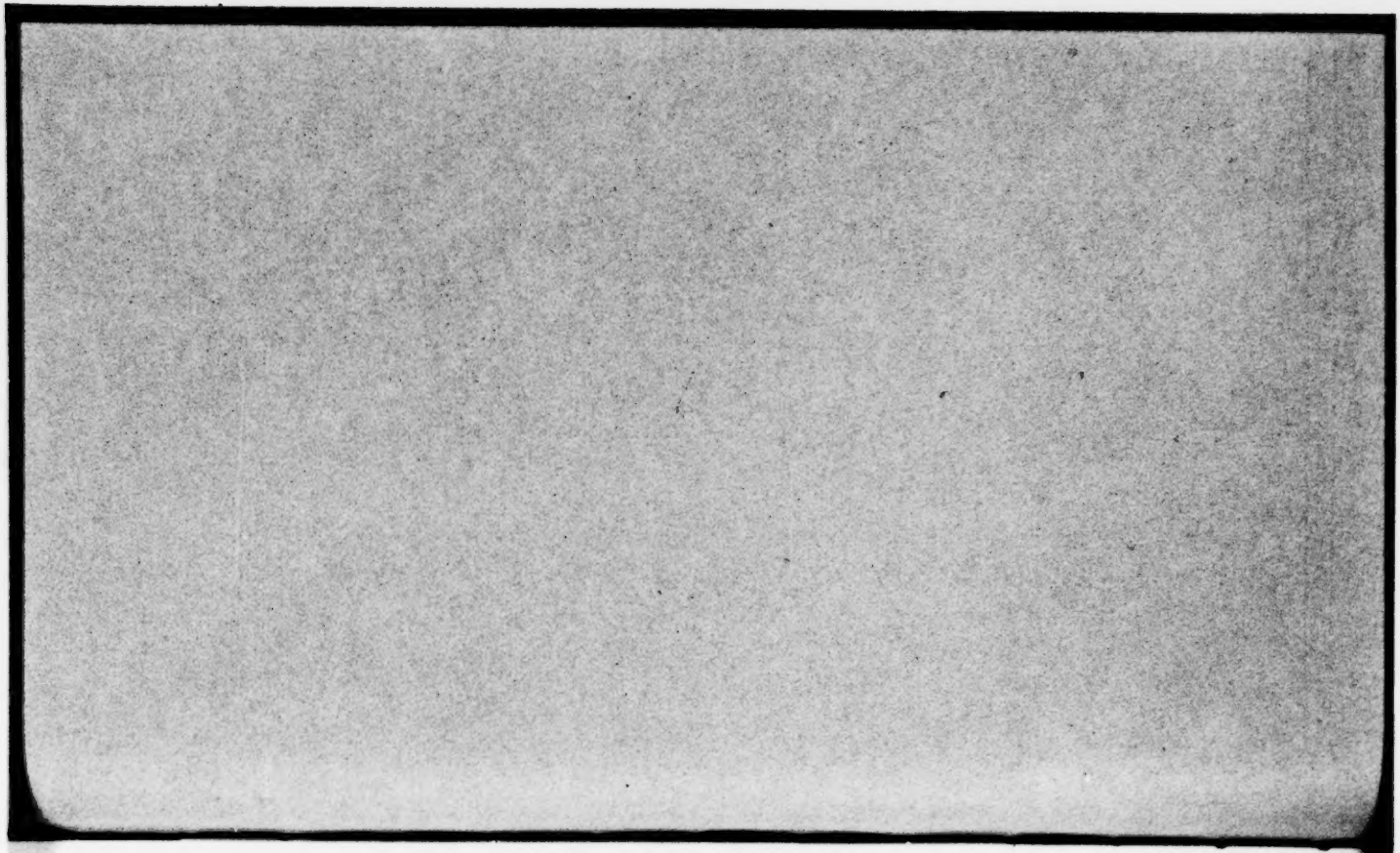

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VS.

HARRY B. WOLF, CHARLES M. BLACKMAR, HENRY A. BUNDSCHU, DEFENDANTS IN ERROR.

STATEMENT.

This is an action originally instituted by defendant in error as plaintiff in the District Court of the United States for the Western Division of Western District of Missouri against the plaintiff in error as defendant to recover overcharges made in excess of the lawful published tariff rates. The plaintiff in error will be referred to as the defendant and the defendant in error as plaintiff. All the shipments were strawberries originating in towns in Southwestern Missouri and Northwestern Arkansas located on the Kansas City Southern Railway Company. The plaintiff is the assignee of the different

shippers and consignees, and his right to sue and recover as such assignee is admitted in the agreed statement of facts filed by the parties hereto (paragraph 5, Rec. 30).

The judgment of the District Court was in favor of the plaintiff in the sum of seventeen hundred twenty-three dollars and ninety-three cents ($1723.93), to which was added an attorney's fee fixed by the trial judge at three hundred ($300.00) dollars, taxed as costs (Rec. 7). This judgment was affirmed by the United States Circuit Court of Appeals for the 8th Circuit (Opinion, Rec. 52).

The entire controversy here grows out of the interpretation of rules found in Item 1015, Trans-Missouri Rule Circular 1 B, I. C. C. 261 and Item 319 A, Supplement 1, Trans-Missouri Circular 1, I. C. C. 227. Both of these rules are substantially the same, but were in effect on different dates. It was stipulated between the parties that these rules were in effect at the time the shipments moved and that The Kansas City Southern was a party to the rules and the tariffs containing the rates were governed thereby (Rec. 43-45). The rules are as follows:

Rule contained in Item 1015, Trans-Missouri Circular 1 B, I. C. C. 261:

> "*Icing, Refrigerator Car Service.* Where shippers cannot avail themselves of a regularly scheduled refrigerator car service, refrigerator cars may be furnished for less-than-carload freight at the less-than-carload rates. The minimum charge for cars so furnished will be the charge applicable on 10000 pounds at the second class rate

from point of origin to point of final destination, but not less than $30.00 per car. No charge will be made for initial icing or for reicing."

Rule contained in Item 319 A, Supplement 1, Trans-Missouri Circular 1, I. C. C. 227:

"Where shippers cannot avail themselves of a regularly scheduled refrigerator car service, refrigerator cars may be furnished for less-than-carload freight at the less-than-carload rates. The minimum charge for car so furnished will be the charge applicable on 10000 pounds at the second class rate from point of origin to point of final destination, but not less than $30.00. No charge will be made for initial icing or re-icing."

In order to shorten the record, it was stipulated that only one count of the petition should be printed as the remaining counts are identical on the issues (Rec. 47). The practical effect of the rule can be illustrated by using a concrete example.

For instance, take the shipment found in count one of the petition and stipulation. The railroad collected one hundred sixty-seven dollars and forty-eight cents ($167.48) (Rec. 34), and this charge was made by using the carload rate and a weight of 17,000 pounds, the minimum weight, plus a charge for refrigeration. The proper charge under the above rule on this shipment is one hundred fifty-two dollars and twenty-eight cents ($152.28) (Rec. 40). This charge is calculated by using the less-than-carload rate, which is 94c per hundred weight (Rec. 40) at the actual weight of the shipment, which is 16,200 pounds (Rec. 34). Under the rules in

items 1015 and 319 A, *supra*, "*no charge will be made for initial icing or re-icing.*"

In other words, by using the class rate at actual weight, a lower charge is made than by using the carload rate at the minimum weight (which is 17,000 pounds) plus refrigeration. Under the rules found in Item 1015 and 319 A, *supra*, this could be done because the rules say that "*a car may be furnished at the less-than-carload rate*," provided a minimum of 10,000 pounds was paid for at the 2nd class rate, and also if there was no regularly scheduled refrigerator car service and the testimony was that there was no regularly scheduled less-than-carload refrigerator service and this testimony was undisputed (Rec. 26, 27). The 10,000 pound minimum at second class rate is not in this case, because in every instance it was exceeded.

The difference between the two amounts above is fifteen dollars and twenty cents ($15.20), the amount of overcharge.

The plaintiff in error is misleading in his statement of the case (page 5, Brief), when he states that the rates charged the shipper were based on tariffs on file with the Interstate Commerce Commission. In their statement, they refer to the portion of the stipulation found on transcript, page 30, paragraph 7, but this should be read in connection with paragraph 8 of the stipulation, Trans. 30, which is as follows:

> "That the rates as contended for by the plaintiff (defendant in error here), are lawfully published and are on file according to law with the

Interstate Commerce Commission and they apply based on actual weight without regard to minimum and they can be lawfully used whenever they are applicable."

The plaintiff in error has made reference in his statement to the fact that the tariffs were not offered in evidence. There was no occasion to do this as all parts of the tariffs which had any application to the question in controversy were covered by the stipulation and it was unnecessary to burden the record with any further testimony upon this subject (Rec. 29).

The petition was drawn originally in 142 counts. Eighty-eight of these were dismissed at the trial.

Issues.

The gist of the petition is that the charge assessed by the plaintiff in error was contrary to the existing lawful and published tariff rate governing and applying upon said shipments and that the excess of such charge was fifteen dollars and twenty (20) cents. The other counts of the petition raise the same issue.

The defendant's principal defense is the statute of limitation appearing in Section 16 of Interstate Commerce Act.

BRIEF OF THE ARGUMENT.

I.

The two year statute of limitation found in section 16 of the interstate commerce act has no application to cases, such as the one at bar, instituted in the first instance in the District Court of the United States.

The plaintiff asserts as a basis of this suit that the charges assessed by the Kansas City Southern Railroad, upon the shipments in question, were in excess of the lawful published tariff rates. This is not a case where it is contended that the carrier has collected an unreasonable rate, or has charged a discriminatory rate. In other words it is simply a suit to recover overcharges. The situation is the same as if the Kansas City Southern Railway had exacted a charge of 12c per hundred weight when the published traffic rate was 10c per hundred weight.

As will be pointed out hereafter in this brief, there was no reason why application should have been made to the Interstate Commerce Commission, because from the very nature of the claim, it is one of which the United States or State Courts have original jurisdiction. It is unnecessary to go beyond the plain language of the statute to arrive at the conclusion that the two year statute of limitation, mentioned in Section 16 of the Interstate Commerce Act, has no application to the case at bar.

Section 9 of the Interstate Commerce Act provides

that "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies and must in each case elect which one of the two methods of procedure herein provided for, he or they will adopt."

This Section has not been amended or altered since its original passage. It plainly shows the two remedies which are open to any person who has suffered damages by reason of the violation of any of the provisions of the Interstate Commerce Act and the charging of rates in excess of the lawful published tariff rates is a violation of the Act. It also specifically states that such party shall be entitled to use *either of said remedies but not both.* There is nothing in this section which places any limitation upon the time in which such a suit should be instituted in court. This leaves the matter of time entirely open. It is unnecessary to cite authorities to show, unless a limitation appears elsewhere in the Act, that the state statute of limitation (R. S. Missouri, 1919, Section 1317) applies.

The part of the section pertinent is "within five years all actions on contracts, liabilities, express or implied."

It will also be observed that Section 9 of the Act states:

> "* * * may make complaint to the Commission as hereinafter provided for."

In other words the statute points out the mode of procedure if the plaintiff elects to bring his suit originally in the District Court of the United States. On the other hand, should he choose to go before the Interstate Commerce Commission, he must seek elsewhere, in the Act in order to determine the method of procedure.

On examining Section 16 of the Interstate Commerce Act, we find that it deals exclusively with procedure before the Interstate Commerce Commission except that in sub-division "B" of the Section it provides for the enforcement in the courts of the United States of orders for the payment of money made by the Interstate Commerce Commission. It also provides:

> "All complaint for the recovery of damages shall be filed *with the Commission* within two years from the time the cause of action accrued, and not after, and a petition for the enforcement for an order of the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order and not after."

There is nothing in this section which in any way relates to Section 9 of the Interstate Commerce Act, nor is there anything said in the section with reference to the limitation of the time in which a suit shall be instituted originally in the District Courts of the United States, but the statute does specifically say that such claims shall be filed with the Commission within two years from the time the cause of action accrues. If the

construction which the defendant places on the statute is to prevail, the court must either read out of this section of the Act the words "with the Commission," or must read into this section words which extend its meaning to suits instituted originally in the United States District Court.

The defendant has pointed out in its brief that this section is no ordinary statute of limitations, that it goes further than merely barring the remedy, but destroys the liability. They ask the court to read something into the Act or read something out of the Act, and in that way destroy the plaintiff's cause of action. There is nothing ambiguous about this section. There is no call upon this court to construe a legislative act that is obscure or that may have a double meaning. The defendant asks the court to read into the statute what it conceives to be the intention of Congress.

Chief Justice Marshall stated in the case of *United States* v. *Wiltberger*, 5 Wheaton, 77, l. c. 95-6:

> "The intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

The defendant contends that in enacting the Interstate Commerce law it was the policy of Congress to attempt to prevent discriminations. We are confronted with a situation here which calls upon the court to construe what Congress has actually done and not what Congress intended or attempted to do.

In the case of *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, l. c. 36 and 37, Mr. Justice Harlan said:

> "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But as declared in *Hadden* v. *Barney*, 72 U. S. 5 Wall. 107, 111 (18: 518, 519) 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the Act is explicit,' this court has said, 'There is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature * * *'."

The defendant relies upon the case of *Phillips* v. *The Grand Trunk Western Railroad*, 236 U. S. 662. This case has no application to the one before the court, because the Phillips case was a suit to recover unreasonable charges but nevertheless, the charges assessed were the published tariff charges while this is a suit to recover overcharges collected in excess of the public published tariff rates.

In the case of *Lyne* v. *D. L. & W. R. R. Co.*, 170 Fed. 847, l. c. 849, the same point of construction contended for here was squarely before the court and the court said:

> "It is further objected that the action cannot be maintained for the reason that Section 16 of the

act, as it now stands, provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and the petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of order, and not after.' "This provision applies only to the second method of procedure, described in the act, and not to a suit instituted under Section 9. There is no limitation prescribed by the act for the commencement of a suit under Section 9."

See also:

Copp v. *L. & N. Ry. Co.*, 50 Fed. 164.
C. R. I. & P. Ry. v. *Lena Lumber Co.*, 137 S. W. 562 (Ark.).

Section 8 of the Interstate Commerce Act provides in substance that any carrier subject to the provisions of the Act which shall omit any act, matter or thing in the Act required to be done shall be liable to the person or persons injured thereby for the full amount of the damages.

It will be observed that this section provides no limitation of time within which the suit shall be brought.

Paragraph G of Section 6 of the Interstate Commerce Act prohibits a carrier from collecting a greater amount than that provided in the published tariffs.

Section 22 of the Act provides:

"And nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by Statute, but the provisions of this Act are in addition to such remedies."

There is no limitation placed in this section of the Act.

It is not necessary to go to the Interstate Commerce Act to find support for the claim asserted here. Independent of the Act, a carrier is liable for any excess collected over its published tariff rates. In the case before the court the plaintiff asserts a right cognizable either before a state court of competent jurisdiction or before a United States District Court.

In *Pennsylvania R. R. v. Puritan Coal Co.*, 237 U. S. 121, l. c. 129, the court said with reference to Section *22*:

> "That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by statute. It was also intended to preserve existing remedies such as those by which a shipper could, in a state court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common law duties and the like.
>
> * * * * * * *
>
> "Construing, therefore, paragraphs 8, 9, and *22* in connection with the statute as a whole, it appears that the Act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action."

In *Pennsylvania R. R. v. Sonman Shaft Coal Co.*, 242 U. S. 120, the court said (l. c. 123):

> "Thus we have held that a manifest purpose of the provision in paragraph *22* is to make it plain

> that such 'appropriate common law and statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced."

Reading all of the Interstate Commerce Act together it is easily seen that Congress placed no restriction or limitation as to the time in which suits could be instituted in the first instance in the courts. In the last analysis the contention of the defendant, that the two year statute of limitation in Section 16 of the Interstate Commerce Act, applies to the case at bar, must fail for the simple and obvious reason that the Interstate Commerce Act has in no place stated, suggested or indicated that the limitation applies to suits instituted in the United States District Courts in the first instance. There is only one limitation and that is the state statute.

II.

(A) Plaintiff's suit is not based upon the decision of the Interstate Commerce Commission in the Gees case. (B) The basis of the plaintiff's claim is a right which may be asserted in the District Court of the United States without first making application to the Interstate Commerce Commission.

A.

Plaintiff's suit is not based upon the decision of the Interstate Commerce Commission in the Gees case.

The gist of the plaintiff's petition is found in paragraphs 2 and 3 of the petition (Rec. 4) which are as follows:

2.

"That at all times hereinafter mentioned A. Grossenbach Company was a corporation with its principal place of business at Milwaukee, Wisc., and owners of the following described property, to-wit:

540 Crates Strawberries of the weight of 16,200 pounds.

"That on or about the 17th day of May, 1910, said owners caused to be delivered to defendant carrier and said railroad did accept and receive from said owner, the hereinbefore described property for transportation and shipment from Neosho, Mo., to Milwaukee, Wisc. (shipped in car CFX 10192), for the services so by defendant carrier performed, said defendant did charge, exact and collect from said owner the sum of $167.45.

3.

"That such charge was contrary to the existing, lawful and published tariff rate governing and applying upon said shipment at the legal rate of 94 cts. per 100 lbs., on actual weight, or the lawful sum due and owing defendant by said owner thereon, in the sum of $152.28, to said owner's damage in the sum of $15.17."

Paragraph 2 sets out the character and weight of the freight shipped, its point of origin, its destination and the amount of freight charges exacted by the railroad company. Paragraph 3 charges that the amount of freight collected was contrary to the existing lawful and published tariff rates, and sets out the lawful tariff rate and the amount of the overcharge collected. This part of the petition clearly alleges an action for damages either under the Interstate Commerce Act (paragraph G, Section 6), or at common law.

The tariff authority for plaintiff's contention is W. T. L. tariff, 18B, I. C. C. A. 110, also item 319 A, Supplement 1, Trans-Missouri Rule Circular 1, I. C. C. 227, as set forth in the agreed statement of facts (Rec. 43).

The Kansas City Southern Railway Company was not a party to the case of *Gees* v. *St. Louis & San Francisco Railroad* before the Interstate Commerce Commission. (See unreported opinion Interstate Commerce Commission A-992, case 6102.) The tariff construed in the Gees case was Southwestern Lines Commodities Tariff No. 2, in L. Leland's I. C. C. No. 844, Item 42½, of Supplement No. 9. That tariff is not involved in the case at bar, and therefore we have a situation where the previous ruling of the Interstate Commerce Commission involved a construction of a tariff which is not the same tariff involved in the case at bar, and construed in a complaint before the Commission in which the defendant in the case at bar was not a party. We find no case which goes so far as to say that a liability can be worked out against this defendant under those circumstances. This case was not presented in the District Court upon the ruling of the Interstate Commerce Commission in the Gees case as a basis for recovery, nor in the Circuit Court of Appeals, but was presented there and is presented here upon the theory that the defendant railroad company charged more than the lawful published tariff rates.

The part of the petition which the defendant urges as a bar to recovery should be treated as surplusage.

(B) *The basis of the plaintiff's claim is a right which may be asserted in the District Court of the United States without first making application to the Interstate Commerce Commission.*

The plaintiff bases his claim upon the following rules, which are substantially the same but in effect upon different dates.

Rule contained in Item 1015, Trans-Missouri Rule Circular 1B, I. C. C. 261:

> "*Icing, Refrigerator Car Service.* Where shippers cannot avail themselves of a regularly scheduled refrigerator car service, refrigerator cars may be furnished for less-than-carload freight at the less-than-carload rates. The minimum charge for cars so furnished will be the charge applicable on 10000 pounds at the second class rate from point of origin to point of final destination, but not less than $30.00 per car. No charge will be made for initial icing or for reicing."

Rule contained in Item 319 A, Supplement 1, Trans-Missouri Circular 1, I. C. C. 227:

> "Where shippers cannot avail themselves of a regularly schedule refrigerator car service, refrigerator cars may be furnished for less-than-carload freight at the less-than-carload rates. The minimum charge for car so furnished will be the charge applicable on 10000 pounds at the second class rate from point of origin to point of final destination, but not less than $30.00. No charge will be made for initial icing or reicing."

Plaintiff's claim under these rules may be briefly stated as follows:

1. The Kansas City Southern Ry. Co. maintained "no regularly scheduled refrigerator car service" (Record 26 and 27).

2. Because there was no such service the rule became operative.

3. When there was no such service, the carrier was obligated to furnish a refrigerator car.

4. Such car would be furnished at the less-than-carload rates. The minimum of 10000 pounds for the car at the second class rate is not involved because all of the shipments were over this minimum.

5. No charge should be made for the initial icing or reicing.

6. A higher rate was charged by the Kansas City Southern, and plaintiff is entitled to recover all excess so collected over the first class rate.

The parties to this suit entered into an agreed statement of facts (Rec. 29 to 45) covering practically all of the issues in the case. The main point upon which there was any difference was on the application of the statute of limitations. The defendant *suggests this situation* because on page 1 of its brief it states that the main question involved is the two year statute of limitations.

The agreed statement of facts, referred to, included all of the tariffs covering the shipments in question, the charges assessed by the carrier, the weights, rates and charges claimed by the plaintiff (Rec. 29 to 45).

The rates contended for by the plaintiff are found on pages 40 to 43 of the record and also in paragraphs 10 to 17 on pages 43 to 45 of the record, and that they were

in effect on the date that the shipments moved, and that all of the tariffs containing the said rates were subject to rule 1015 and 319-A, as hereinbefore set out. The agreed statement of facts further provides (paragraph 4, Rec. 30) that the rate and freight charges as contended for by plaintiff are correctly set out according to his basis, that is, they (plaintiffs) have not made any clerical errors, and that if the plaintiff's contention prevails, charges should be so assessed.

Paragraph 8 of the stipulation provides:

> "That the rates as contended for by the plaintiff are lawfully published and are on file, according to law with the Interstate Commerce Commission, and they apply, based on the actual weight without regard to minimum and they can lawfully be used whenever they are applicable."

In the case of *Great Northern Railroad Company* v. *Merchants Elevator Company*, decided by this court on May 29th, 1922, the court said:

> "But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission."

There must be something in the tariff or the rule which is obscure or which is ambiguous or technical, to necessitate an application to the Interstate Commerce Commission to have its meaning made clear. In the case at bar it is curious that the need for the construction by

the Commission of the tariff did not arise until after the two years statute of limitations (Sec. 16) had passed. Previous to this time the Kansas City Southern Railway Company had paid thousands of dollars in claims based upon the construction of the tariff contended for here, and this was done without any order of the Interstate Commerce Commission. If the plaintiff is not correct in his position, then the defendant had no right to pay these claims, but aside from that no testimony can more firmly establish the fact that the rule is plain, clear, unambiguous and devoid of any technical meaning requiring the assistance of the Interstate Commerce Commission, than the fact that the defendant paid many claims based upon the same construction of the rule which we ask in this suit without an order of the Commission.

The witness Wolf (Rec. 14) testified:

> "Further than that, why, I handled railroad claims on the very same commodities and filed them with the Kansas City Southern, and went into the matter of the tariff with them as to the construction, and it was agreed to by them that was correct, and at later dates they paid the claims. Then on other occasions I went to the local freight agent of the Kansas City Southern on shipments that were coming in and explained the situation to them and had proper charges assessed."

and again on page 15 of the record:

> "The construction they placed upon the tariff was that the transportation companies were compelled to handle the strawberries in their fastest trains, that they were to give them proper refrigeration, and assess revenue on basis of actual weight,

> at a first-class rate, which is the less than car load rate applying on strawberries, observing the minimum charge of 10,000 pounds at the second-class rate."

In response to the inquiry as to what officers of the Kansas City Southern he consulted who conceded that the construction of the rule contended for in this case was correct, he replied that D. R. Dailey, freight claim agent of the Kansas City Southern, W. G. Buckner, chief clerk to the freight claim agent, a Mr. Hamilton, who occupied the same kind of a position and a Mr. Rogers, who was then chief clerk to the general freight agent of the Kansas City Southern, were among the officers he consulted (Rec. 15).

> "Q. And the result of that was that the claims which you presented upon the basis contended for in this petition were paid?
> "A. There were in the neighborhood of 100 claims of like character that were paid. The situation was identical to the claims in which—in this cause."

The construction placed upon the rules by the Kansas City Southern Railway officials is further shown in the testimony of the witness Ducket, who presented similar claims on behalf of members of the Topeka Traffic Association. A letter, addressed to J. F. Holden, vice-president of the Kansas City Southern Railway Company, setting up the same claim as asserted by the plaintiff in this case, was offered in evidence (See Rec. 20). In reply to that letter Mr. Holden sent the following letter (Rec. 21):

"Mr. H. D. Driscoll,
Commissioner, Topeka Traffic Assn.,
Topeka, Kansas.

Dear Sir:

Answering your personal letter of September 27th, beg to advise that I have looked into this subject, and believe, according to tariffs published, that there is nothing for us to do but to pay your claims for refrigeration; although I do not hesitate to say, it seems to be unreasonable that we should be in a position of doing for L. C. L. shipments what we are not expected to do for C. L. shipments.

If you will send your claims to Mr. H. A. Weaver, Assistant General Freight Agent, with whom I have discussed the subject, they will be taken care of.

Yours truly,

(Signed) J. F. Holden,
Vice President.

c. c. Mr. Weaver."

Mr. Ducket also testified that following the exchange of these letters, claims amounting to four thousand dollars were filed under the same construction of the rules asserted in this case and paid by the Kansas City Southern Railway on authority of Mr. Holden, Mr. Mitchell and also the freight claim agent, Mr. Daly (Rec. 22).

The defendant offered no evidence to controvert any of the statements of Mr. Wolf or Mr. Ducket, and indeed they could not have done so, because every official in the Kansas City Southern Railway, who knew anything about these rates, conceded the position of the plaintiff with reference to this rule was correct.

In the early part of 1913 the Kansas City Southern

filed with the Commission a tariff suspending the rule which is the basis of this suit from operation on the Kansas City Southern Railroad. Protest was made and the tariff was suspended until May 10th, 1913.

At the hearing before the Commission, witnesses appeared on behalf of the Kansas City Southern Railway and as a basis of justification, for placing the new tariff into effect, adopted the same construction that the plaintiff has placed upon the tariff rule in this suit. See Investigation and Suspension Docket No. 210, Refrigeration Charges on the Kansas City Southern Railway, 26 I. C. C. No. 617.

Before the two years statute of limitations, provided in Section 16 of the Interstate Commerce Act, had run, the Kansas City Southern officials agreed with the construction which the plaintiff contends for in this case. When the Kansas City Southern Ry. Co. filed its complaint before the Interstate Commerce Commission to get rid of the rule, its interpretation was the same as the plaintiff seeks to put on the rule, and this being the situation, defendant, if consistent, can do nothing but concede that the plaintiff is still right and that, therefore, no previous application to the Interstate Commerce Commission was necessary.

The rule is conditioned upon only one requirement, and that is "where shippers cannot avail themselves of a regularly scheduled refrigerator car service." The witness Wolf testified that the Kansas City Southern Railway had no regularly scheduled refrigerator car service. He went to various stations on the Kansas City Southern

in view of arranging about shipments. He talked with the Kansas Southern officials. He examined their tariff and train sheets and found that there was no such service (Rec. 26-27). The letter from J. F. Holden, vice-president of the Kansas City Southern Railway, set out above, and the acts of the Railway Company in paying claims upon the same basis as that asserted in this suit, is corroborative of Mr. Wolf's testimony. None of the Kansas City Southern officials testified that they had such a service and it is reasonable to presume that had such a service existed, they would have been presented at the trial and testified to that effect. When it appeared that the plaintiff in error had no such refrigerator car service, there was one rate and only one rate which should be applied and that was the less-than-carload rate. These were established by the agreed statement of facts.

In the case of *R. W. Gees Commission Co.* v. *the St. Louis & San Francisco Railroad Company*, unreported opinion by C. C. A-992, case 6102, printed at pages 35 to 39 of the plaintiff in error's brief, the Interstate Commerce Commission made this observation with reference to the rule in force in the St. Louis & San Francisco tariff:

> "The rule, however, is without restriction or limitation and the intention with which it was made cannot be permitted to give it a meaning other than that which plainly appears on its face."

What was there for the Interstate Commerce Commission to determine? No ambiguity appears in the rule, no administrative act of the Commission is called for.

The question to be answered to determine whether the plaintiff was entitled to the rates for which he contends is whether or not the defendant maintained a regularly scheduled refrigerator car service. If they did, no one would assert that the rule applied. If they did not, it is equally clear that the rule should be applied and the contention of the plaintiff prevail.

When the case of *Gees* v. *St. Louis and San Francisco*, cited *supra*, was decided by the Interstate Commerce Commission, none of the administrative powers of the Commission were called into play. Its actions were of a quasi judicial nature, and its order demonstrates the correctness of plaintiff's position, where it is said in ordering reparation: "which charges so collected have been found to have been in excess of the lawfully published charges." * * * (See Defendant in Error Brief 39).

See also *Running* v. *C. St. P. M. & O. etc.*, 19 I. C. C. 565.

In the case of *Great Northern Railway Co.* v. *Merchants Elevator Co.*, cited *supra*:

> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

It should be kept in mind that in the case before the court, the action is one to recover charges assessed in ex-

cess of the lawful published tariff rates and that it is not one which in any way involves unjust, unlawful, discriminatory, preferential or prejudicial rates. Concretely, the question is whether or not under the circumstances stated in the rule the shipper is entitled to the benefit of the less-than-carload rate providing he is willing to pay for ten thousand pounds at the second class rate as a minimum. The only limitation on the rule is whether or not the shipper is able to avail himself of a regularly scheduled refrigeration less-than-carload service. That limitation has gone out of this case because the undisputed testimony is that the railway company maintain no such service. There is nothing in this rule which calls for an exercise of the administrative or executive functions of the Interstate Commerce Commission. The rule is printed in plain English and all shippers have a right to rely upon that wording of the rule.

Swift & Co. v. *U. S.*, 255 Fed. 291, and
Southern Railway Co. v. *Campbell*, 239 U. S. 99.

The rule is as simple as a situation where the published tariff rate is 11c and the railroad exacted a charge of 12c.

In the case of *National Elevator Company* v. *Chicago, Milwaukee & St. Paul Railway Company*, 246 Fed. 588 (C. C. A. 8th Circuit), the controversy before the court turned upon this rule.

> "'Between stations on the C. M. & St. P. Railway rates to or from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named.'"

The court said,

> "The defendant insists that the case should have been brought before the Interstate Commerce Commission for reparation and the District Court had no jurisdiction.
>
> *"It will be conceded that if the tariffs have two distinct and conflicting rates for the same shipment, the shipper is entitled to the benefit of the lower of these rates.* (italics ours.)"

In *Southern Railroad Company* v. *Campbell*, 239 U. S. 99, the plaintiff instituted a suit in the first instance in the State Court based on a claim involving the interpretation of a certain mileage rule as follows (l. c. 102):

> "If a mileage ticket or tickets issued in exchange for coupons therefrom be presented to an agent or conductor by any other than the original purchaser, it will not be honored, but will be forfeited and any agent or conductor of any line over which it reads shall have the right to take up and cancel such ticket or tickets."

The Supreme Court discussed this rule and rendered an opinion based upon an interpretation of that rule. This illustrates that the well founded doctrine is that the courts have jurisdiction in the first instance to give interpretation to the published tariffs of common carriers.

Defendant cites the opinion of Judge Sanborn in the case of *North American Company* v. *St. Louis & San Francisco* (U. S. D. C. Eastern Division Eastern District of Missouri), page 40, defendant's brief, but the issues in that case, while somewhat similar to those here,

were vastly different in other respects. That case involved the interpretation of certain rules of the St. Louis-San Francisco Railroad. In addition to the rule regarding the minimum charge when shippers were not able to avail themselves of the regularly scheduled refrigeration car service, the St. Louis-San Francisco Railroad had another rule, in Frisco Freight Tariff, 6 H. I. C. C. 5985, page 40, defendant's brief, which stated that, "the expense of icing refrigerator cars at initial point and of reicing same in transit, shall be borne by the shipper, consignee or owner of the property so protected and no portion of the charges assessed for such service will be refunded."

It was also stated that "this company (St. Louis & San Francisco) will not join with any transportation or refrigeration car line in any arrangement to conflict with this rule."

The St. Louis and San Francisco Company introduced a great mass of testimony with respect to certain of its rules and customs, and Judge Sanborn states in his opinion that the question was one involving "confused and complicated tariffs and rules which have been set forth and conflicting evidence to which reference has been made."

We are not prepared to admit that even though a rule be complicated that the United States Courts are not without jurisdiction in the first instance to interpret and determine its meaning, but in the case before the court, we are confronted with no such situation as Judge Sanborn makes reference to. The testimony was all one

way, supplemented by the evidence of the actions of the officers of the railway company, that as far as the rule was concerned there was nothing complicated, complex or confusing. The rule was plain to them, because in the past they have paid numerous claims without question.

In the two cases cited, *supra*, *Southern Railway Company* v. *Campbell*, and *National Elevator Company* v. *Chicago, Milwaukee & St. Paul Railway Company*, it has been expressly held that the courts have the right to determine the meaning of rules published in tariffs. The fact that different courts might arrive at different conclusions on the interpretation of the meaning of tariffs is no reason of itself why they should be ousted of their jurisdiction when the question before the court is one of failure to apply the published tariff rate. The answer to Judge Sanborn's reasoning on this phase of the question is found in the two cases cited, *supra*, *Southern Railway Company* v. *Campbell*, and *National Elevator Company* v. *Chicago, Milwaukee & St. Paul Railway Company*.

Judge Sanborn in his opinion states that if he should arrive at a different conclusion from the Commission "the lack of uniformity of decision and action on such questions which Congress sought to secure by the Act to Regulate Commerce would be well illustrated" (Defendant's Brief 45). The fallacy of this reasoning is pointed out in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, cited, *supra*, where it is said:

> "The contention that courts are without jurisdiction of cases involving a disputed question of construction of an interstate tariff, unless there has

been a preliminary resort to the Commission for its decision, rests in the main, upon the following argument: The purpose of the Act to Regulate Commerce is to secure and preserve uniformity. Hence, the carrier is required to file tariffs establishing uniform rates and charges, and is prohibited from exacting or accepting any payment not set forth in the tariff. Uniformity is impossible if the several courts, state or Federal, are permitted, in case of disputed construction, to determine what the rate or charge is which the tariff prescribes. To insure uniformity the true construction must, in case of dispute, be determined by the Commission.

This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal law. If the parties properly preserve their rights, a construction given by any court, whether it be Federal or state, may ultimately be reviewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission."

There are two methods for the recovery of damages resulting from a violation of the Act, such as charging more than the tariff rate. That is a person may either present his claim within the two year period to the In-

terstate Commerce Commission, or he may sue direct in the District Court of the United States.

National Elevator Company v. *C. M. & St. P. Ry. Co.*, 246 Fed. 588.

In *National Pole Co.* v. *C. & N. W. Ry. Co.*, 211 Fed. 65, l. c. 71, the court said as follows:

> "If a shipper states in his complaint that he paid 12 cents per hundred weight on certain described shipments, that during the time of the shipments the carrier had a published tariff of 10 cents per hundred weight on such shipments, and that the payments exacted of the shipper were unjust to the extent of 2 cents per hundred weight, the stated facts make a good complaint, for the statutory prohibition of unjust rates is directly effective by reason of the published rate's being equivalent to a statutory declaration of the maximum of reasonable rates * * *. Such a complaint for damages is presentable to the commission for its *quasi* judicial action. Or, under section 9, THE PLAINTIFF MAY AT ONCE DEMAND JUDGMENT in a federal District Court." (our emphasis)

See also:

Mitchell Coal & Coke Co. v. *Pennsylvania Ry. Co.*, 230 U. S. 247.

Pennsylvania Ry. Co. v. *International Coal Co.*, 230 U. S. 184.

There was at one time an uncertainty as to what causes should be filed in the first instance before the Interstate Commerce Commission, and those which might either be filed in the first instance before the Interstate Commerce Commission or in the federal court. Cases involving the exercise of the administrative functions of the Commission should in the first instance be filed be-

fore the Interstate Commerce Commission. While on the other hand, if the action is based upon a violation or discriminatory enforcement of the carrier's published tariffs, rules or regulations, it may be brought in the federal court in the first instance.

L. & N. R. R. Co. v. Cook Brewing Co., 223 U. S. 70.
Pennsylvania Ry. Co. v. Puritan Coal Mining Co., 237 U. S. 121.
National Elevator Co. v. C., M. & St. P., supra.

In *Illinois Central Ry. Co. v. Mulberry Coal Co.*, 238 U. S. 275, l. c. 283, the court said:

> "But if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution, no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or the Federal courts."

In the case before the court, the rights of the parties were fixed at the time shipments moved by tariffs lawfully filed and which were in full force and effect.

See also:

St. L. I. M. & S. v. Hasty, 255 U. S. 252.
Pennsylvania R. Co. v. Sonman Coal Co., 242 U. S. 120.

III

The Evidence Sustains the Judgment.

At the trial of the case a jury was waived and the trial judge found the facts in favor of the plaintiff. The defendant has stated that (page 10 of Brief) the main

question involved in this case is the two year statute of limitations and this statement lends itself to the suggestion that defendant concedes the weakness of the point it raises with reference to the sufficiency of the evidence. At the trial of the case the plaintiff introduced in evidence an agreed statement of facts which practically disposed of every question necessary to sustain the burden of proof and supplemented this by oral testimony. The evidence clearly showed that the freight offered was of the kind and character to entitle the plaintiff to recover. It was not necessary to introduce any tariffs, because these were all included in the agreed statement of facts, also the rates and basis of plaintiff's claim (Rec. 29 to 45).

After the completion of the trial of the case Judge Van Valkenburgh took the case under advisement and subsequently filed a memorandum on the final hearing (Rec. 49) in which he said:

> "And from the action of the defendant in similar cases, the statements of its officers and representatives, all bearing upon the interpretation of the rule in question, it is not believed that the underlying right of the plaintiff to recover is seriously contested. However, upon the entire record, the court is of opinion that plaintiff is entitled to recover."

The plaintiff is not only entitled to the benefit of all of the testimony which he introduced in the case, but also entitled to every reasonable inference which can be deduced therefrom. The evidence produced amply sustains the plaintiff's position, and this court will not disturb the findings of the trial judge.

"Where a case is tried by the court, a jury having been waived, its findings upon questions of fact, are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

Dooley v. *Pease*, 180 U. S. 126 l. c. 131.
Stanley v. *Albany County*, 121 U. S. 547.

We respectfully submit that the decision of the lower court should be affirmed.

JOSEPH P. DUFFY,
HENRY A. BUNDSCHU,
CHARLES M. BLACKMAR,
Attorneys for Defendant in Error.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* WOLF ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 194. Argued January 9, 1923.—Decided February 19, 1923.

1. Under §§ 9 and 16 of the Interstate Commerce Act, 24 Stat. 382; 34 Stat. 590, an action by a shipper to recover charges collected by a carrier in excess of tariff rates must be brought within two years from the time when the cause of action accrued. P. 138.
2. The lapse of a longer time not only bars the remedy but destroys the liability. P. 140.

272 Fed. 681, reversed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the defendants in error in an action to recover overcharges from the Railway Company.

Mr. Frank H. Moore, with whom *Mr. Cyrus Crane*, *Mr. Samuel W. Moore* and *Mr. George H. Muckley* were on the brief, for plaintiff in error.

Mr. Charles M. Blackmar, with whom *Mr. Henry A. Bundschu* and *Mr. Joseph P. Duffy* were on the brief, for defendants in error.

Section 9 of the Commerce Act plainly shows the two remedies which are open to any person who has suffered damages by reason of the violation of any of the provisions of the act, and the charging of rates in excess of the lawful published tariff rates is a violation of the act. It also specifically states that such party shall be entitled to use either of said remedies but not both. There is nothing in this section which places any limitation upon the time in which such a suit should be instituted in court. This leaves the matter of time entirely open. Unless a limitation appears elsewhere in the act, the state statute of limitation applies.

Section 16 of the Commerce Act deals exclusively with procedure before the Commission, except that in subdivision (b) it provides for the enforcement in the courts of the United States of orders for the payment of money made by the Commission. There is nothing in this section which in any way relates to § 9, nor is there anything said with reference to the limitation of the time in which a suit shall be instituted originally in the District Court; but the statute does specifically say that such claims shall be filed with the Commission within two years from the time the cause of action accrues. If the construction which the defendant places on the statute is to prevail, the Court must either read out of § 16 the words "with the Commission," or must read into it words which extend its meaning to suits instituted originally in the District Court.

The defendant has pointed out in its brief that this section is no ordinary statute of limitations, that it goes further than merely barring the remedy, and destroys the liability. But the section is not ambiguous and, consequently, there is no room for construction, *United States* v. *Wiltberger*, 5 Wheat. 77, 95, 96; nor can its plain words be supplanted by speculation concerning the policy of Congress. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36, 37.

Phillips Co. v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, has no application. It was a suit to recover unreasonable charges but nevertheless charges assessed according to a published tariff.

The question involved was decided in *Lyne* v. *Delaware, Lackawanna & Western R. R. Co.*, 170 Fed. 847, 849. See also *Copp* v. *Louisville & Nashville R. R. Co.*, 50 Fed. 164; *Chicago, R. I. & P. Ry. Co.* v. *Lena Lumber Co.*, 99 Ark. 105.

Section 8 of the Commerce Act provides in substance that a carrier which shall omit any act, matter or thing in the act required to be done shall be liable to the person or persons injured thereby for the full amount of the damages. This section provides no limitation of time within which the suit shall be brought. Paragraph (g) of § 6 prohibits a carrier from collecting a greater amount than that provided in the published tariffs. Section 22 provides that nothing in the act shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of the act are in addition to such remedies. There is no limitation placed in this section.

Independently of the act, a carrier is liable for any excess collected over its published tariff rates. In the case before the Court the plaintiff asserts a right cognizable either before a state court of competent jurisdiction or before a United States District Court. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 129; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120, 123.

The suit is not based, as claimed by the defendant, upon a ruling of the Commission involving the tariff in question. The basis of the plaintiff's claim is a right which may be asserted in the District Court without first making application to the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285.

The action is one to recover charges assessed in excess of the lawful published tariff rates and not one which in

any way involves unjust, unlawful, discriminatory, preferential or prejudicial rates. Concretely, the question is whether or not under the circumstances stated in a rule of the Commission the shipper is entitled to the benefit of the less-than-carload rate providing he is willing to pay for ten thousand pounds at the second class rate as a minimum. The only limitation on the rule is whether or not the shipper is able to avail himself of a regularly scheduled refrigeration less-than-carload service. That limitation has gone out of this case because the undisputed testimony is that the railway company maintains no such service. There is nothing in this rule which calls for an exercise of the administrative or executive functions of the Commission. The rule is printed in plain English and all shippers have a right to rely upon the wording of the rule.

There are two methods for the recovery of damages resulting from a violation of the act, such as charging more than the tariff rate. That is a person may either present his claim within the two-year period to the Commission, or he may sue directly in the District Court. *National Elevator Co.* v. *Chicago, M. & St. P. Ry. Co.*, 246 Fed. 588; *National Pole Co.* v. *Chicago & N. W. Ry. Co.*, 211 Fed. 65, 71; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184.

Cases involving the exercise of the administrative functions of the Commission should in the first instance be filed before the Commission. While, on the other hand, if the action is based upon a violation or discriminatory enforcement of the carrier's published tariffs, rules or regulations, it may be brought in the District Court in the first instance. *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121; *National Elevator Co.* v. *Chicago, M. & St. P. Ry. Co., supra; Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275, 283.

In the case before the Court, the rights of the parties were fixed at the time shipments moved by tariffs lawfully filed and which were in full force and effect. *St. Louis, I. Mt. & So. Ry. Co.* v. *Hasty & Sons,* 255 U. S. 252; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.,* 242 U. S. 120.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The original action was begun in the United States District Court, Western District of Missouri, May 12, 1915, to recover charges in excess of the published tariff rates collected by the plaintiff in error upon sundry interstate shipments of strawberries. All the shipments and payments were made prior to June 1, 1912. The company demurred, "because each of said counts shows upon its face that the pretended claim which is made the basis of such count accrued more than two years prior to the institution of this action."

The trial court overruled the demurrer and this was approved by the Circuit Court of Appeals (272 Fed. 681), which said: "The controlling question in the case is whether the claims for repayment of the overcharges might be the subject of an original action in court, or, on the other hand, should first have been submitted to the Interstate Commerce Commission. . . . The former procedure was adopted in this case. If the latter should have been followed, the claims were barred by the limitation provided in section 16. We think it quite plain that there was nothing about the tariffs, rules, or claims for overcharge calling for any administrative action of the Commission as a prerequisite to an action in court. There was no attack upon the tariffs or the rules."

From 1906 to 1920 the Interstate Commerce Act, 24 Stat. 379, 382; 34 Stat. 584, 590, provided—

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions

of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

"Sec. 16. . . . All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after." [1]

In *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667, an action begun in the United States Cir-

[1] The Transportation Act, February 28, 1920, c. 91, 41 Stat. 456, 492, amended the pertinent portion of § 16 so that it now reads—

"Sec. 16 (3). All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order, and not after."

Section 9 was not changed by the Transportation Act, 1920.

cuit Court, the plaintiff alleged that the Interstate Commerce Commission had declared the published tariff rate unreasonable and sought to recover overcharges paid more than four years prior thereto. Referring especially to § 16, *supra*, this Court declared—

"Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *United States*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. . . . To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. . . . The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action."

True it is that the claim of Phillips & Co. was based upon schedule tariff charges theretofore declared to be unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the *Phillips Case* and the reasoning advanced to sup-

port it, we think, are applicable to the circumstances of the instant cause. The lapse of time had destroyed any liability by the carrier to the shipper or his assignee for the alleged overcharges, and the demurrer should have been sustained.

Reversed.